85-870

Supreme Court, U.S.
FILED
NOV 20 1985
JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,
Petitioners,

vs.

ROBERT W. KELLEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an appellate court's failure to award costs pursuant to Rule 39, Federal Rules of Appellate Procedure, precludes an award of attorneys' fees under the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, which provides for fee awards "as part of the costs."

2. Whether a 1972 order of the Court of Appeals approving a desegregation plan as in conformity with existing Supreme Court mandates and resolving all issues then before the Court is not a final order precluding the reopening of the litigation prior to 1972 for an award of attorneys' fees pursuant to 42 U.S.C. §1988, merely because the District Court retained jurisdiction in the case and supplemental activity relating to implementation of the desegregation plan occurred.

3. Whether, in considering plaintiffs' application for attorneys' fees pursuant to 42 U.S.C. §1988, the Court of Appeals may properly reverse the District Court's factual findings concerning the proceedings at the trial level or the appropriate hourly rates to be awarded, without finding those decisions clearly erroneous.

4. Whether the District Court *must* award a plaintiff's counsel his requested hourly rate or personal billing rate when the proof establishes a lower rate prevailing in the relevant legal community.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Metropolitan County Board of Education of Nashville and Davidson County, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 23, 1985.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals for the Sixth Circuit entered on September 23, 1985 (reprinted in the Appendix at A. 1) is reported at ____ F.2d ____ (6th Cir. 1985). The panel's opinion on the same appeal which was subsequently vacated by a majority of the Court's judges upon the peti-

tioners' application for rehearing *en banc* is reprinted at A. 29. These opinions review the District Court's opinion, *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.*, (reprinted at A. 43), which is reported at 558 F.Supp. 468 (M.D. Tenn. 1983).

In addition, for the Court's convenience the most recent substantive opinions relating to the attorneys' fees issue before the Court are contained in the Supplemental Appendix, referred to herein as S.A..

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 23, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, §1988 as amended. Proceedings in vindication of civil rights; attorney's fees. (Reproduced in pertinent part.)

> In any action or proceeding to enforce a provision of §1981, 1982, 1983, 1985 and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

United States Code, Title 28, Rule 39, Federal Rules of Appellate Procedure. Costs. (Reproduced in pertinent part.)

> (a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if

a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

STATEMENT OF THE CASE

This case concerns the application of the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, to a thirty year old desegregation case in Nashville, Tennessee, and the relative roles of the District Courts and Courts of Appeal in considering awards under that statute.

In 1983, the District Court for the Middle District of Tennessee acted on the plaintiffs' motion for attorneys' fees filed in 1975, finding that fees should not be awarded for work performed prior to a 1971 final remedial order, that fees could not be awarded for the numerous appeals in which the plaintiffs had never been awarded costs, and that the time for which compensation was requested by the plaintiffs should be reduced 10 % for duplication and for reconstruction of time records. The District Court then awarded fees for substantially all hours claimed since 1972 at the 1983 prevailing community rates ($100.00 for experienced counsel and $60.00 for associate counsel), and added to this a 25% multiplier. 558 F.Supp. 468 (M.D. Tenn. 1983) (A. 43-68). On appeal, a panel initially reversed and remanded the case (A. 29), and on application of the Board of Education, a majority of the active judges voted to rehear the case *en banc*. Following the rehearing, a divided Court of Appeals rejected almost totally the District Court's opinion. In so doing, the Sixth Circuit rejected the clear relationship between costs and attorneys' fees under 42 U.S.C. §1988 recognized by this Court in *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), required the reopening of the 1971 order for an award of fees, and reversed the District Court's decisions concerning finality and appropriate rates without holding them clearly erroneous. The Court of Appeals then

remanded the case to the District Court for further hearings as to pre-1972 and appellate fees, along with the direction to determine, pursuant to *Hensley v. Eckerhart,* 461 U.S. 424 (1983), when the plaintiffs had prevailed during this thirty year old lawsuit. (A. 1-28).

A. The Historical Underpinnings of the Fee Award

1. The 1971 desegregation plan deemed final by the District Court.

This desegregation case began in 1955 immediately following *Brown v. Board of Education,* 347 U.S. 483 (1954). Since 1955, many remedial orders have been entered adopting desegregation plans which mirrored the development of desegregation law from *Brown v. Board of Education, supra,* to *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), to *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). With each passing era of desegregation law, new remedies were adopted for Nashville's public schools.[1]

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[1] For example, in 1958 the District Court approved a remedy providing for gradual desegregation (not integration) of the Nashville city schools. This was the famous "grade a year" plan, upon which many other localities modeled their plans. At that time, this plan was sufficient to comply with Supreme Court mandates, and the District Court later adopted a parallel plan for Davidson County. *E.g. Kelley v. Board of Education of Nashville City Schools,* 8 R.R.L.R. 651 (M.D. Tenn. 1958), *aff'd,* 270 F.2d 209 (6th Cir. 1959), *cert. denied,* 361 U.S. 924 (1959); *Maxwell v. Board of Education of Davidson County,* 203 F.Supp. 768 (M.D. Tenn. 1960), *aff'd,* 301 F.2d 828 (6th Cir. 1962), *rev'd in part and remanded sub nom, Goss v. Board of Education of Knoxville,* 373 U.S. 683 (1963). These plans remained in effect long after the consolidation of the county and city cases by consent decree on September 10, 1963. Indeed, there were no efforts to change the plan until the decisions of the Supreme Court in *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), and *Alexander v. Holmes County Board of Education,* 396 U.S. 19 (1969).

In 1971, the District Court, pursuant to the plaintiffs' motions for immediate relief based upon *Green, supra,* ordered the implementation of a comprehensive desegregation plan drafted by a team from HEW, mandating busing for racial balance purposes in every area of this 500 square mile county where it was practical to do so, pursuant to the model in *Swann, supra.* (S.A. 169). This plan was appealed by both the plaintiffs and defendants, each urging their own plan for the school system. 463 F.2d 732 (6th Cir. 1972) (S.A. 179). On May 17, 1972, both appeals were rejected by the Sixth Circuit, which found the HEW plan in compliance with Supreme Court mandates. The Court of Appeals thus affirmed the HEW plan, rejected the plaintiffs' application for attorneys' fees and double costs under the law prevailing at that time, and ordered the parties to pay their own costs. 463 F.2d 734, 743-47, 752 (S.A. 185-86, 205-12, 224). While approving the plan as one designed to establish a unitary school system, the Court of Appeals recognized that should adverse effects or changed circumstances occur after implementation, these problems could be addressed by the District Court under the general notion that all decrees in equity are susceptible to modification based upon changes in the law or facts. *Id.* at 745-46 (S.A. 209). On November 6, 1972, the Board of Education's petition for certiorari was denied by this Court. 409 U.S. 1001 (1972) (S.A. 225).

2. **Substantive proceedings after 1971.**

After the implementation of the 1971 desegregation plan in the fall of 1971, all efforts of the District Court were directed toward assuring the plan's adequate implementation and/or adjusting it in light of changed circumstances.[2] 558 F.Supp. 468,

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[2] Prior to 1979, only two short hearings were held, one involving the recalcitrance of the city council (which was added as a party) in funding the purchase of sufficient buses, and the other involving a group of intervening parties who sought busing costs from the Department of Health, Education, and Welfare. *See* 492 F.Supp. 167, 172-75 (M.D. Tenn. 1979) (S.A. 72-74).

473-74 (A. 50-53). On April 11, 1975, the plaintiffs first filed their motion for attorneys' fees. (A. 106). In 1979, the first new round of hearings directed toward changing the plan which had been in effect for more than eight years began, the plaintiffs asserting that demonstrable adverse effects associated with busing young black children mandated changes, and the defendants asserting that population growth and shifts mandated changes in school utilization and building.

After months of proof beginning in 1979, the District Court in 1980 determined that changed circumstances and resegregation, resulting from the 1971 remedy itself, not from the actions of the school board, mandated consideration of a new and different remedy. 479 F.Supp. 120, 122-23 (M.D. Tenn. 1979) (S.A. 43-45); 492 F.Supp. 167 (M.D. Tenn. 1980) (S.A. 62). On April 17, 1981, this plan was approved by the District Court. 511 F.Supp. 1363 (M.D. Tenn. 1981) (S.A. 128). On August 19, 1981, just two days before school was to open under the new desegregation plan, the Court of Appeals ordered the District Court's new plan stayed, stating in part that "*a final desegregation order*" (the 1971 plan) should not be modified without prior appellate review. (S.A. 155-56). Upon the school board's application for extraordinary writ to this Court, Justice Stevens declined to disturb the Court of Appeals' stay, sharing the view that changes in the final 1971 plan should be reviewed by the Court of Appeals before they were implemented. (S.A. 157-58). On July 27, 1982, the Sixth Circuit rejected the District Court's new plan, finding that it "do[es] not withstand constitutional scrutiny."[3]

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[3] The Sixth Circuit's *en banc* opinion argues that the plan to which it was referring in this statement was the 1971 plan. (A. 6). It is clear from the Sixth Circuit's 1982 opinion that the plan which was being considered was the District Court's new plan, calling in part for elementary schools of a neighborhood character. 687 F.2d 814, 824 (6th Cir. 1982) (S.A. 6). Certiorari was denied by this Court on January 24, 1983. 459 U.S. 1183 (1983).

B. The District Court's Fee Award

In 1982, the District Court held a hearing on the plaintiffs' request for over $1.4 million in attorneys' fees, representing plaintiffs' claim for legal work reconstructed by counsel[4] from 1955 to the date of the hearing. Relying on *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 635 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), and *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir. 1978), the District Court initially held that the fee application for work performed prior to the District Court's approval of a comprehensive desegregation plan in 1971, affirmed by the Sixth Circuit in 1972, was barred, because the 1971 order was a final one representing a discrete step in the litigation which settled all issues to that point, including costs and attorneys' fees. The District Court found that any litigation after affirmance of the 1971 order was directed not toward attacking the order itself but toward implementing it and modifying it as changed circumstances or adverse effects could be demonstrated. 558 F.Supp. 468, 473-74 (M.D. Tenn. 1983) (A. 50-54).

The District Court then applied the rule set forth in *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982), holding that since costs had never been awarded to the plaintiffs on any appeal during the long history of the litigation, pursuant to Rule 39(a), Federal Rules of Appellate Procedure, they could not at this late date recover attorneys' fees for those appeals under the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, which awards such fees as "costs." 558 F.Supp. 468, 476 (A. 55-56).

After excluding pre-1972 and appellate fees, the District Court found, based upon the testimony of a myriad of local attorneys, that $100.00 per hour for senior attorney Williams and $60.00 per hour for associate attorney Dinkins constituted the

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[4] Counsel's claim for the entire thirty year period was based on reconstructed time.

prevailing rate in 1983 in the city of Nashville. 558 F.Supp. 468, 478 (A. 60-62). The District Court applied these 1983 prevailing rates ($100.00 and $60.00) to all hours claimed by the plaintiffs for District Court work since 1971, with the minor exception of 10% for duplication and reconstructed time, and a small amount of time spent with an expert witness whose testimony the plaintiffs had later repudiated. To this sum, the District Court added a 25% multiplier, thereby effectively increasing Mr. Williams' rate to $125.00 per hour, and Mr. Dinkins' rate to $75.00 per hour. 558 F.Supp. 468, 478-79 (A. 60-62).

Both the plaintiffs and defendants appealed. The plaintiffs asserted that the 1971 order was not a final one under *Northcross, supra,* and that the hourly fee calculated for each lawyer should be raised. The defendants asserted that they should not be responsible for fees resulting from the actions of intervening parties, and that, in any event, *Hensley v. Eckerhart,* 461 U.S. 424 (1983), required the District Court to determine specific stages in this lengthy litigation where the plaintiffs had prevailed.

C. The En Banc Opinion of the Court of Appeals

After a three-judge panel reversed and remanded the District Court's order on February 12, 1985 (A. 29), a majority of the active judges[5] of the Court voted, upon the school board's application, to rehear the case *en banc.* After the hearing, a divided Court entered an opinion which (1) reversed its earlier decision in *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982), holding that costs under 42 U.S.C. §1988 are separate and distinct from appellate costs under Rule 39(a), Federal Rules of Appellate Procedure (A. 6-9); (2) held that the 1971 order was not a final order constituting a discrete step in the Nashville school litigation (A. 3-6); and (3) mandated that the District Court *must* award Mr. Williams his regular hourly rate of $120.00 per hour and Mr. Dinkins $65.00 per hour, in addition to the 25%

[5] Two judges recused themselves from consideration of this case: Judge Gilbert Merritt and Judge Nathaniel Jones.

multiplier awarded by the District Court. (A. 10-12).[6] The Court then remanded the case to the District Court to consider pre-1972 fees and appellate fees, and to determine the specific extent to which the plaintiffs had prevailed under *Hensley v. Eckerhart,* 461 U.S. 424 (1983) (A. 14-16).

A vocal minority, consisting of Judges Kennedy, Engle, and Wellford, dissented in part in two separate opinions. (A. 17, 23). In her opinion, Judge Kennedy, joined by Judges Engle and Wellford, pointed to two problem areas in the majority's opinion. First, the Court's illogical and ill-conceived efforts to distinguish costs under Rule 39(a), Federal Rules of Appellate Procedure, from attorneys' fees awarded as costs under 42 U.S.C. §1988 violated all principles of statutory construction, created a direct conflict with the Eleventh Amendment pursuant to *Atascadero State Hospital v. Scanlon,* ____ U.S. ____, 105 S.Ct. 3142, 3148 (1985), rejected this Court's reasoning in *Marek v. Chesney,* ____ U.S. ____, 87 L.Ed.2d 1 (1985) and, in essence, treated attorneys' fees litigation as an illegitimate child, related neither to costs or judgments, a view most circuit courts had not taken. Second, Judge Kennedy wrote that the $100.00 per hour rate upon which the District Court based its award to Mr. Williams was supported by the record as the generally prevailing rate at the time of the 1983 hearings and was thus clearly within the Court's discretion to award, especially for earlier years when much lower rates, including those of Mr. Williams, had prevailed. (A. 17-23).

In a separate and vigorous dissent, Judge Wellford joined in Judge Kennedy's criticism of the majority's rejection of *Buian,* and argued pointedly that the majority had abrogated its duty to examine the record and the District Court's fact-finding before reversing the hourly fee and finality decrees. According to Judge Wellford, rates in Tennessee during the 1970's had been much lower than $100.00 and $60.00 per hour, as evidenc-

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[6] The Court also largely rejected the school board's contention that it should not be billed for work performed relating to the intervening parties. (A. 12-13).

ed by the many circuit court opinions involving some of the same attorneys. Judge Wellford, therefore, would not have disturbed the rates set by the District Court, finding them well within the discretion of the trial judge who was intimately familiar with the local practice and fees charged, and who had heard testimony from many local attorneys during a three-day hearing. (A. 23-28).

Judge Wellford also dissented vigorously from the majority's finding that the 1971 order was not a final one, disposing of all pending issues resurrected with the change in the law brought about by *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). His dissent recognized that all school desegregation cases are continuing in the sense that jurisdiction is always retained to monitor and modify final injunctive orders if necessary, in light of changed circumstances or changes in the law. Thus, Judge Wellford reasoned that the District Court was well within its discretion when it found as a matter of fact, that the 1971 comprehensive desegregation plan was a final discrete step which should not be reopened for an award of fees for legal work performed prior to the order under the 1976 Civil Rights Attorneys Fees Awards Act. (A. 28).

D. **Denial of the Petition to Rehear**

Because the *en banc* opinion was glaringly inconsistent with the Sixth Circuit's own order in 1981 holding that the 1971 desegregation plan was a final order (S.A. 155), the Board of Education petitioned again for a rehearing, which application was summarily rejected. (A. 69-76).[7] A stay of the Court of Appeals' mandate was granted pending the application to this Court. (A. 77).

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[7] The petition for a second rehearing was filed in order to give the Sixth Circuit an opportunity to resolve this conflict. *See Sun Oil Co. v. Burford*, 130 F.2d 10, 13 (5th Cir. 1942) (discussing power of federal circuit court to consider a second petition for rehearing and to recall its mandate to correct inconsistencies).

REASONS FOR GRANTING THE WRIT

I.

In Rejecting The Plain Meaning Construction Reconciling Costs Under Rule 39(a), Federal Rules Of Appellate Procedure, With Attorneys' Fees Awarded As Costs Under 42 U.S.C. §1988, The Sixth Circuit Has Placed Itself In Conflict With Other Circuits, With The Necessary Implications Of This Court's Decision In *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), And With The Eleventh Amendment.

The majority's outright rejection of its previous rule articulated in *Buian v. Baughard*, 687 F.2d 859 (6th Cir. 1982),[8] reconciling costs under Appellate Rule 39 with the award of attorneys' fees as part of the costs by the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988, has created untoward confusion in this circuit and underscored a conflict across the country regarding the nature of attorneys' fees litigation. This position leaves the Sixth Circuit in conflict with opinions from the Fourth, Fifth and Seventh Circuits, *e.g. Gary v. Spires*, 634 F.2d 772, 773 (4th Cir. 1980); *Knighton v. Watkins*, 616 F.2d 795, 797-98 (5th Cir. 1980); *Van Ooteghen v. Gray*, 628 F.2d 488, 497 (5th Cir. 1980), *cert. dismissed*, 451 U.S. 935 (1981); *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980), and with the reasoning of this Court in *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985). Judge Kennedy's dissent

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[8] The Sixth Circuit subsequently recognized on several occasions that fees pursuant to 42 U.S.C. §1988 could not be awarded for appellate work where costs had not been awarded pursuant to Rule 39(a), Federal Rules of Civil Procedure. *Cf. Shimman v. International Union of Operating Engines, Local 18*, 719 F.2d 879 (6th Cir. 1983) (not related to fees under 42 U.S.C. §1988 but recognizing rule). It should be noted that in *Shimman*, Judge Merritt, who had recused himself from the *Kelley* litigation, specifically stated that appellate fees are to be considered as part of the costs under Rule 39(a). *See also Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984), where the mandate was recalled by the Sixth Circuit in order to award costs and fees.

reaches the heart of the conflict when she writes that apparently the majority, without even overruling inconsistent authority in the Sixth Circuit (A. 22),[9] has tacitly adopted the Ninth Circuit's treatment of applications for fees pursuant to 42 U.S.C. §1988 as illegitimate children, falling nowhere within the procedural framework of other civil lawsuits. *Obin v. District No. 9 Int'l Ass'n of Machinists and Aerospace Workers,* 651 F.2d 574 (9th Cir. 1981); *Metcalf v. Borba,* 681 F.2d 1183 (9th Cir. 1982).

This Court in *Marek* recognized the problems in ignoring the clear cost language of Rule 68, Federal Rules of Civil Procedure, and §1988. Without procedural rules neutral in nature governing all types of civil cases, including presumably applications for attorneys' fees falling within them, the administration of justice can never be predictable or efficient. Thus, even apart from the substantive Eleventh Amendment problems raised by the majority's decision to treat civil rights fees as something other than costs without a clear indication that Congress intended to abrogate the Eleventh Amendment,[10] the majority's decision, if allowed to stand, has created a muddle for District Courts considering applications for appellate fees, particularly in protracted cases.

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[9] *See Johnson v. Snyder,* 639 F.2d 316, 317 (6th Cir. 1981) (attorneys' fees awarded under §1988 are awarded as costs and are not controlled by the time limitations of Rule 59(e)); *Fulps v. City of Springfield,* 715 F.2d 1088 (6th Cir. 1983) (costs in Rule 68 do include attorneys' fees when an applicable statute such as §1988 allows attorneys' fees to be taxed as costs to the prevailing party). The *Fulps* reasoning was adopted by this Court in *Marek.*

[10] This problem, articulated by Judge Kennedy in reliance on *Hutto v. Finney,* 437 U.S. 678, 695-98 (1978), and *Atascadero State Hospital v. Scanlon,* ____ U.S. ____, 105 S.Ct. 3142, 3148 (1985) is clear, and is not addressed further herein. *See* Judge Kennedy's discussion at A. 18-19.

The problem for District Courts can be no clearer than in the instant case. During thirty years of litigation and a myriad of appeals, the Sixth Circuit has never once, except in the most recent *en banc* hearing, awarded costs to either party.[11] As Judge Kennedy writes, cost awards are generally matters considered at each level of the federal judicial system for obvious reasons—each level is far more intimately familiar with its own proceedings and the degree to which either party has prevailed. (A. 17-18). With the majority's opinion, not only will the District Courts in the future receive no guidance as to when the plaintiffs may be entitled to fees for appellate work; in this case, and presumably in other protracted cases such as school desegregation cases, the District Court may be required to pass on appellate fee requests based totally on reconstructed time records for thirty years of appeals.[12] This of course will occur without the benefit of the appellate record, briefs, and arguments, and often without the availability of some of the major participants.[13] Under *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this task is well-nigh impossible; under principles of

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[11] There have been many appellate decisions in this case. *E.g. Kelley v. Board of Education of the City of Nashville*, 270 F.2d 209 (6th Cir. 1959), *cert. denied* (upon application of the plaintiffs) 361 U.S. 924 (1959); *Maxwell v. Board of Education of Davidson County*, 301 F.2d 828 (6th Cir. 1962), *rev'd sub nom, Goss v. Board of Education of the City of Knoxville*, 373 U.S. 683 (1963); *Kelley v. Metropolitan County Board of Education, et al.*, 463 F.2d 732 (6th Cir. 1972); *Kelley v. Metropolitan County Board of Education, et al.*, 687 F.2d 814 (6th Cir. 1982), *cert. denied*, 459 U.S. 1183 (1983).

[12] This will occur, of course, if the final order rule enunciated by the District Court, discussed *infra*, is not addressed by this Court.

[13] It should be noted that the plaintiffs here seek fees for services performed prior to 1972 for Mr. Z. Alexander Looby, who died in 1972. 558 F.Supp. at 476 (A. 57).

common sense and orderly procedure this task is clearly avoidable, given the intimate knowledge of each level of the federal judiciary regarding their own proceedings.

For the bad results that the majority's opinion portends, one need only examine closely the litigation in *Willie M. by Singer v. Hunt*, 564 F.Supp. 363 (W.D.N.C. 1983), *aff'd as modified*, 732 F.2d 383 (4th Cir. 1984), relied upon by the majority opinion. (A. 8). In *Willie M.*, the District Court noted the conflict in the circuits and specifically rejected the *Buian* rationale, indicating that cost awards under Rule 39(a) and 42 U.S.C. §1988 are totally distinct. As Judge Kennedy wrote, the plaintiffs prevailed overall in a class action, but the defendants prevailed on one issue which was the subject of an appeal. The Fourth Circuit awarded no costs on the appeal, but nevertheless the District Court allowed the plaintiffs to recover attorneys' fees, including time spent on the lost appeal. In line with their decision regarding costs previously, the Fourth Circuit on the new appeal reversed the part of the decision that allowed attorneys' fees, presumably for the same reason that costs had not been awarded. In so doing, the Fourth Circuit did not address the link between costs and fees or the *Buian* rule.[14] However, had costs and fees gone hand in hand, as Judge Kennedy suggests, there would have been no need for this further protracted litigation regarding fees.

There is simply no need to engage in such double processes, given the clear language of Rule 39(a) and the clear Congressional intent behind 42 U.S.C. §1988. As recognized in *Marek*, when Congress passed 42 U.S.C. §1988, it was well aware of the Federal Rules of Civil Procedure, and presumably also the Federal Rules of Appellate Procedure. The Civil Rights At-

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[14] Contrary to the District Court's opinion in *Willie M.*, the Fourth Circuit had previously recognized the link. *See Gary v. Spires*, 634 F.2d 772 (4th Cir. 1980).

torneys Fees Awards Act was passed in 1976; Rule 39(a) came into existence in 1968 along with the body of uniform appellate rules. Thus, when Congress enacted 42 U.S.C. §1988 and ordered attorneys' fees as part of the costs, and further specifically indicated that attorneys' fees were to be treated "like other items of costs,"[15] Congress clearly understood the inevitable limits to the already existing procedural rules.[16]

Thus, the better rule is the simplest one — the one embodying the plain and simple meaning of the term costs in the rule and statute in issue. This Court applied that rule in *Marek*;[17] the Sixth Circuit previously applied it in *Buian v. Baughard*, and

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[15] Senate Report 94-1011 at 5913 reads in part as follows:

> [D]efendants in these cases are often state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, *like other items of costs*, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party). (Emphasis supplied.) (Footnotes omitted.)

[16] Of course, in interpreting legislative history, there is a presumption that Congress was aware of the judicial construction of existing law and that new legislation therefore was to be construed within the entire framework of federal statutes. *See Shapiro v. United States*, 335 U.S. 1 (1948); *United States v. Professional Air Traffic Controllers*, 653 F.2d 1134, 1138 (7th Cir. 1981). Further, statutes are to be construed so that they harmonize with one another and are applied in a consistent fashion. *Kokoszka v. Bedford*, 417 U.S. 642 (1974); *Bonner v. Coughlin*, 647 F.2d 931 (7th Cir. 1981).

[17] The majority's efforts to distinguish *Marek* in footnote 9 (A. 7-8), with reference to this Court's discussion of *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) in n. 2 to the *Marek* opinion must fail. Rule 39 does not carry with it its own definition of costs and neither does 42 U.S.C. §1988. Indeed, the Advisory Committee notes to Rule 39 not only refer to 42 U.S.C. §1920 where some costs are defined, but also to other statutes defining or precluding cost awards. Thus, Rule 39 contemplates a search of federal substantive statutes for its application, just as does Rule 68, Federal Rules of Civil Procedure.

continues to do so apparently in other contexts. (*See* n. 9, *supra*). This case presents a particularly appropriate mechanism to resolve the conflicts among the circuits, the inconsistencies within the Sixth Circuit, and the conflict with the Eleventh Amendment.

II.

The Majority's Holding That The District Court's 1971 *Swann* Remedy, Affirmed By The Sixth Circuit In 1972, Was Not A Final Order Disposing Of All Issues Between The Parties Is Inconsistent With The Decisions Of Several Circuit Courts.

In *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624, 635 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), the Sixth Circuit previously recognized a rule of finality in protracted civil rights cases which it and other circuit courts of appeal have gleaned from *Bradley v. City of Richmond,* 416 U.S. 696 (1974).[18] While this Court's holding in *Bradley* was expressly limited to the retroactive application of the attorneys' fees provision contained in 20 U.S.C. §1617[19] when the propriety of a fee award was pending resolution on appeal at the time the statute was enacted, 416 U.S. at 710, other courts, including the Sixth Circuit, have promulgated a rule precluding the reopening of final orders in protracted cases for

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[18] *See Wheeler v. Durham City Board of Education,* 585 F.2d 618, 623 (4th Cir. 1978); *Henry v. Clarksdale Municipal Special School District,* 579 F.2d 916, 918-19 (5th Cir. 1978); *New York Ass'n for Retarded Children v. Carey,* 711 F.2d 1136, 1145 (2nd Cir. 1983); *Peacock v. Drew Municipal Separate School District,* 433 F.Supp. 1072, 1075-76 (M.D. Miss. 1977).

[19] This statute was initially used by the plaintiffs as a basis for their fee application in this case. The statute has since been repealed, and the award herein was made pursuant to 42 U.S.C. §1988. (*See* 20 U.S.C. §§3205, 3863.)

the award of attorneys' fees under the 1976 Civil Rights Attorneys Fees Awards Act, 42 U.S.C. §1988. In the majority opinion, the Sixth Circuit again recognized the finality principle, but refused to consider the District Court's 1971 plan, affirmed by the Court of Appeals in 1972, as such a final order disposing of all claims. (A. 3-6). In so doing, the Sixth Circuit has applied a test of finality which is subjective in nature and is inconsistent with other desegregation orders deemed to be final.

The District Court's 1971 order of a comprehensive desegregation plan ushered in by this Court's decision in *Green v. Board of Education of New Kent County,* 391 U.S. 430 (1968) (S.A. 59); *Kelley v. Metropolitan County Board of Education,* 317 F.Supp. 980 (M.D. Tenn. 1970), fully settled the issues before the Court. The 1971 plan was implemented without a stay from the District Court (S.A. 169, 178), and was in effect in Nashville even before the Court of Appeals affirmed the plan on May 30, 1972, and denied a stay of its mandate pending a petition for certiorari by the school board. (S.A. 212, 225).

In 1983, the District Court, relying on *Northcross, supra,* held that this comprehensive desegregation plan was a final one which could not be reopened for an award of fees requested by the plaintiffs on April 10, 1975.[20] At the time of the plaintiffs' motion, the desegregation plan had been in effect for almost five full school years. The only litigation had concerned matters related to implementation, particularly the need for and source of additional buses. The only filings had concerned plaintiffs' efforts to demonstrate certain adverse effects from the plan, and the defendants' efforts to take care of and house the burgeoning and ever-changing population in Nashville and

[20] While the District Court and the Court of Appeals noted that plaintiffs had filed their petition for fees on February 8, 1974, the record reveals that the petition referred to was filed by a group of third party plaintiffs. Instead, the plaintiffs filed their petition for fees on April 10, 1975. (A. 100, 106).

Davidson County.[21] Thus, the District Court, pursuant to *Northcross,* deemed the 1971 order a final one, upon which a collateral attack in the form of a delayed fee application should not be made. 558 F.Supp. at 472-475 (A. 48-54).

The majority only attacks the District Court's decree as to finality under the 1976 Civil Rights Attorneys Fees Awards Act because litigation resulted after 1971, and because, in its opinion, neither the parties nor the Court of Appeals deemed the order an end to the litigation. Aside from the gross usurpation of the District Court's particular fact-finding function in fee cases and the inconsistencies apparent in the Court of Appeals' characterization of the substantive as opposed to the fees issues in this case, discussed *infra* in III, these factors have simply not been deemed the critical test of finality by other circuits.

As an example, in *Henry v. Clarksdale Municipal Separate School District,* 579 F.2d 916 (5th Cir. 1978), neither pending litigation to require bus transportation nor the pending of an attorneys' fees motion was deemed sufficient to disturb the finality of a comprehensive remedial order. Similarly, in *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir. 1978), the court's retention of jurisdiction in order to supervise the city's desegregation plan was not sufficient to disturb the finality of a previous remedial order, even when accompanied by a motion for further relief following *Swann.* Curiously, the Sixth Circuit in *Northcross* alluded to the possibility that a 1966 order might meet the requirements for finality, a finding later made by the District Court (A. 84-85),[22] but the Sixth Circuit

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[21] A close examination of the Court of Appeals' description of the action in this case after 1971, reveals that the proceedings were supplemental in nature and were not designed to attack the 1971 order itself. (A. 5, n. 3.)

[22] The 1966 order to which this Court was referring merely approved tentatively the implementation of a desegregation plan for the coming school year, and ordered the plaintiffs to file objections within three weeks. *Northcross v. Board of Education of Memphis City Schools,* Civil Action No. 3931, July 29, 1966. (A. 78).

simultaneously recognized that no one understood this order to be the end of the litigation in Memphis.[23]

By reversing the District Court, the Sixth Circuit has left the door open in these protracted civil rights cases. As this Court is aware, many district courts across the country have retained jurisdiction of civil rights cases subject to "final" remedial injunctions, all of which may be modified as appropriate showings of adverse effects, changed circumstances, or contempt are made.[24] Without those showings or a change in the applicable law, presumably these final remedial orders may not be disturbed. Similarly, in the absence of changed circumstances (resegregation) or adverse effects shown to be caused by the 1971 plan, that plan would presumably be in effect today.

Does the Sixth Circuit's opinion mean that the door is always open for applications relating to fees long since incurred and mandates long since issued? The Court of Appeals has answered a hazy yes, calling into question the finality of other remedial orders entered prior to 1971 in this thirty year old

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[23] In *Northcross*, the Sixth Circuit stated as follows: "A limited plan was adopted in 1963, and a year later, this Court again reversed, rejecting the plan as inadequate. Nearly two years later, in 1966, a modified plan was tentatively approved by the District Court, and an uneasy state of repose was reached. While the plaintiffs objected to some aspects of the plan, their motion for an injunction was denied. At the same time, however, the board was put on notice by the court that some aspects of the plan needed further study and additional relief might be ordered in the future." 611 F.2d at 628-629.

[24] This litigation does not impair or refute any order's finality — if it did no order in equity would ever be final. All orders in equity are susceptible to later enforcement actions or actions based upon changes in the law or facts. *E.g. United States v. Swift Co.*, 286 U.S. 106, 119 (1932); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

desegregation case,[25] and presumably in other long-running civil rights actions across the country.

The position taken by the Sixth Circuit in this case does nothing to enhance the ultimate goal of 42 U.S.C. §1988 — the attraction of competent counsel to civil rights litigation.[26] Cases such as *Northcross* and *Kelley* were begun long before fee awards were generally available, and critical stages of these cases were decided long before any lawyers could be lured by the prospect of fees pursuant to the 1976 civil rights statute. Conversely, if the parties' subjective intent or continued litigation of any nature after a final decision in a desegregation case such as *Northcross* and *Kelley* reopens the entire case for an award of fees, the prospects for abuse will be great, and it will be impossible to find a reliable factual basis for a fee award for services performed ten or twenty years earlier. *See Gautreaux v. Chicago Housing Authority,* 690 F.2d 601, 608 (7th Cir. 1982); *Henry v. Clarksdale Municipal Separate School District,* 579 F.2d 916, 919 (5th Cir. 1978).[27]

To petitioners' knowledge, this Court has not directly passed on this finality issue. Consideration by this Court, particularly in light of the remand whereby the District Court will be required to review other final remedial orders in this case, appears appropriate.

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[25] *See* n. 1, *supra.*

[26] Senate Report 94-1011, reprinted in 1976 U.S. Code Congressional Administrative News, p. 5908.

[27] In this instance it should be noted here that all fees requested by the plaintiffs in *Kelley* were based upon reconstructed time, including those hours plaintiffs claim their counsel expended in the 1950's and 60's. Further, Mr. Z. Alexander Looby, one of the counsel for whom plaintiffs seek fees, died several years ago. 558 F.Supp. at 476 (A. 57).

III.

The Court Of Appeals Has Totally Usurped The District Court's Fact-Finding Function In Attorneys' Fees Cases.

As Judge Wellford wrote in dissent, in two separate instances the Court of Appeals flagrantly violated this Court's often repeated directive that the "District Court has discretion in determining the amount of a fee award." *Hensley v. Eckerhart,* 416 U.S. at 437. (A. 25). Without ever determining that the District Court's fact-finding was clearly erroneous, the Court of Appeals required the District Court to raise the hourly rates awarded to Mr. Williams and Mr. Dinkins and to consider pre-1972 fees because the 1971 HEW plan was not a final one. Such holdings obliterate the functions of the two levels of the federal judiciary, remove the decisions from the District Court which is most familiar with the various elements thereof, and unnecessarily prolong attorneys' fees litigation.

As Judges Kennedy and Wellford recognized in their separate opinions (A. 17 and 23), the Court of Appeals totally ignored the myriad of lawyers who testified as to prevailing rates in Nashville, Tennessee, a necessary inquiry in light of this Court's recent opinion in *Blum v. Stenson,* ____ U.S. ____, 79 L.Ed.2d 891 (1984). According to the majority's opinion, such inquiries are apparently superfluous — the rate awarded *must be* the plaintiffs' lawyers' current billing rate — in this case for Mr. Williams $120.00 per hour. It did not matter that the prevailing rate among respected and experienced members of the Nashville Bar in December, 1982 was closer to $100.00 per hour, the rate awarded by the District Court for Mr. Williams' services.[28] It did not matter, as Judge Kennedy noted, that Mr. Williams had

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[28] *See* Transcript, December 6, 1982: testimony of Thomas W. Steele, p. 207, exhibit 5; testimony of Charles Hampton White, p. 204, exhibit 4; testimony of Ward DeWitt, pp. 152-153, exhibit 3; testimony of John Hollins, p. 224, exhibit 6; testimony of George Barrett, p. 360. Mr. DeWitt testified that he often charged much less to his volume clients, p. 154.

only begun charging $120.00 per hour less than a year before the 1982 hearings. (A. 23). It did not matter that from 1977 to the date of the hearings, fees paid to defendants' counsel ranged from $75.00 per hour in 1978 to $95.00 per hour in 1982 for Mr. Willis, and $50.00 per hour in 1978 to $75.00 per hour in 1982 for Ms. Harrison.[29] It did not matter that Mr. Dinkins had no personal hourly rate, but that the testimony showed the fair value of his services to be somewhere between $50.00 to $75.00 per hour.[30] It did not matter that the fees applied by the District Court ($100.00 for Mr. Williams and $60.00 for Mr. Dinkins) were applied to all hours compensated from 1972 to 1983, during which period, as Judge Wellford graphically points out, hourly rates were much lower. (A. 25-28). It did not matter that the time compensated was based totally upon reconstructed time, a practice this Court has previously criticized, *Hensley v. Eckerhart*, 461 U.S. 424, 437, 441-42 (1983),[31] and that the District Court nevertheless added on a 25% multiplier.

The Court of Appeals' cavalier handling of the hourly fee question underscores its further usurpation and torturing of the District Court's fact-finding relative to the finality of the 1971 order. Never did the Court of Appeals consider that a massive busing order affirmed pursuant to *Swann v. Charlotte-*

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[29] Exhibit 17 to hearings of December 6, 1982.

[30] *See* Transcript of December 6, 1982; testimony of Ward DeWitt ($50.00 per hour), p. 154; testimony of Cecil Branstetter ($60.00 to $70.00 per hour), p. 126; testimony of John Hollins ($65.00 to $75.00 per hour), p. 224, *See also* testimony of Mr. Dinkins, Transcript, December 6, 1982, pp. 312-315.

[31] Significantly, no court has recognized that plaintiffs' counsel charged more than $14,000.00 in fees for reconstructing time records, for which, along with other time spent, plaintiffs sought a 100% multiplier. Transcript, December 6, 1982, p. 260. The District Court did not eliminate this time.

Mecklenburg had been in place for twelve years at the time of the fee hearings. Never did the Court of Appeals acknowledge that the 1971 plan was ordered changed only because changes in population and adverse effects had directly resulted from the plan itself over the intervening decade. 479 F.Supp. at 123 (S.A. 45). Never did the Court of Appeals acknowledge that its own panel had clearly viewed the 1971 plan as a final order when it had stayed the implementation of the District Court's new plan in 1981, only two days before school was to start with the following language:

> And concluding...that where (as here) after many, many years a *final school desegregation order* has been entered in the District Court, and appealed to this Court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought.

Kelley v. Metropolitan County Board of Education, No. 81-5370 (6th Cir. August 19, 1981) (S.A. 156) (Emphasis supplied).

Rather, in all instances the Sixth Circuit majority has begun, without examining the extensive record or the specific findings made by the District Court, with the proposition that the award of $139,500.00 in fees was "inadequate." (A. 16). From that proposition alone the Court of Appeals set about determining how that fee could be raised without reference to the District Court's fact-finding or deference to its intimate knowledge concerning its own proceedings.

Nowhere is the error in this approach more glaring than in the Court of Appeals' opening remarks that the $139,500.00 constituted less than ten percent of the amount requested, a disturbing statement at best when the bill presented by the plaintiffs is closely examined. The $1.4 million fee request was bottomed on

rates for Mr. Williams and Mr. Dinkins that were *four times* the prevailing rates in Nashville, Tennessee — $490.00 for Mr. Williams and $240.00 for Mr. Dinkins taking into account the requested 100% multiplier.[32] Similarly, the Court of Appeals' effort at comparing attorneys' fees paid defendants' attorneys is problematic, since the Court simultaneously failed to recognize that for the same period during which defendants' counsel were paid for their hourly time expended, plaintiffs' counsel were awarded almost their full request in terms of hours minus a small amount for time spent with an expert witness whose testimony they repudiated before the Court of Appeals and this Court. 558 F.Supp. at 478-79 (A. 60-62).[33] These examples are merely indicative of the reasons why this Court has given the District Court wide berth in attorneys' fees cases.

This Court recently re-emphasized the wide discretion vested in the District Court in determining the amount of a fee award. The reasoning behind this balancing of roles was deemed to be

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[32] *See* Exhibit 13 to December 6, 1982, hearings.

[33] The only hours subtracted by the District Court outside of the appellate and final order issues considered previously were 10% for duplication (offset by the 25% enhancement) and a small amount of time spent with Dr. Hugh Scott, whose neighborhood school approach the plaintiffs abandoned on appeal. (A. 60-62).

The Court of Appeals further attempted to compare fees paid to defendants' counsel to those awarded plaintiffs' counsel in n. 8, A. 16. Here the Court also failed to note that the Board of Education developed three desegregation plans during this period, held hundreds of hours of public hearings thereon which the school board's attorneys were required to attend, and actively pursued a time-consuming third party complaint against several state defendants which is now on appeal. Accordingly, while the defendants' lawyers did bill more hours for their time during the same period compensated the plaintiffs, their tasks were not comparable to those of the plaintiffs and they also billed at a significantly lower rate than did the plaintiffs' attorneys.

"the District Court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Here, the District Court demonstrated unequivocally its grasp of the litigation and its full consideration of the record before it in making its award. In contrast, the Court of Appeals has opted for a generalization. If this type of review is allowed to stand and to continue, the District Court's function in the Sixth Circuit, and perhaps in other Circuits, will be forever usurped, and appellate review will be the rule rather than the exception in attorneys' fees litigation.

CONCLUSION

This Court has stated that a "request for attorneys' fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In arriving at this policy statement the Court has underscored the District Court's discretion in reviewing and characterizing the proceedings and work before it, in view of the District Court's intimate familiarity with its own proceedings. *Id.*

The Sixth Circuit's opinion in this case is worthy of review because it misconstrues the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, and in so doing comes into conflict with at least one decision of this Court, *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), and with several circuit court opinions. Perhaps most importantly, however, the Sixth Circuit's opinion, if allowed to stand, has increased exponentially the inevitability of protracted attorneys' fees litigation. It has done so by removing the Court of Appeals' first hand control over appellate fees through its power to award its own costs, by permitting the reopening of a final desegregation order which settled all issues then pending, and by usurping the District Court's discretion to examine its own proceedings and local fee standards to award fees at the trial level.

As Judge Wellford stated in his opinion, "I dissent because I believe Judge Wiseman acted fairly and within the bounds of his sound discretion and applied the law reasonably to the facts of the case." (A. 28). If the Sixth Circuit's opinion is permitted to stand, such a result will never be sufficient to withstand appellate scrutiny, particularly in protracted civil rights cases.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing petition has been mailed to Mr. Avon Williams, 203 Second Avenue North, Nashville, TN 37201; Mr. Theodore Shaw, NAACP Legal Defense Fund, 99 Hudson Street, 16th Floor, New York, NY 10013; and Mr. Stephen Nunn, Deputy Attorney General, 450 James Robertson Parkway, Nashville, TN 37219 on this 19th day of November, 1985.

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.
Attorneys for Peteitioners

APPENDIX

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APPENDIX A

Nos. 83-5175, 5243

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Robert W. Kelley et al.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

Metropolitan County Board of
Education, et al.,
Defendants-Appellees,
Cross-Appellants.

On Appeal from the
United States District
Court for the Middle
District of Tennessee.

Decided and Filed September 23, 1985

Before: LIVELY, Chief Judge; ENGEL, KEITH, KENNEDY, MARTIN, CONTIE, KRUPANSKY, WELLFORD and MILBURN, Circuit Judges; and EDWARDS and CELEBREZZE, Senior Circuit Judges.[1]

KRUPANSKY, Circuit Judge, delivered the opinion of the court in which LIVELY, C.J., KEITH, MARTIN, CONTIE and MILBURN, JJ., joined. KENNEDY, J., (pp. 17-23) delivered a separate opinion, concurring in part and dissenting in part in which ENGEL and WELLFORD, JJ., joined, with WELLFORD, J., (pp. 24-29) also

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[1] The court's decision to review the instant case *en banc* effectively vacated the prior Sixth Circuit opinion on this case which was printed at 755 F.2d 67 (6th Cir. 1985).

delivering a separate opinion, concurring in part and dissenting in part.

KRUPANSKY, Circuit Judge. Plaintiffs Robert W. Kelley and the class he represents appealed and defendant Metropolitan County Board of Education (Board) cross-appealed the district court's award of attorney's fees in this school desegregation case.

Commencing on the heels of the landmark case of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the instant case has spawned volumes of court opinions and orders at both the district and appellate levels. These decisions need not be recounted in detail here. *See, e.g., Kelley v. Metropolitan County Board of Education,* 687 F.2d 814 (6th Cir. 1982), *cert. denied,* 459 U.S. 1183 (1983); *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972); *Kelley v. Metropolitan County Board of Education,* 511 F.Supp. 1363 (M.D. Tenn. 1981). Suffice it to say that the litigation undoubtedly required hundreds of hours of work by the plaintiffs' and Board's attorneys.

The plaintiffs' initial motion for attorney's fees, pursuant to the Educational Amendments of 1972, 20 U.S.C. § 1617, was filed on February, 8, 1974. Subsequent filings amended the pending motion to include a prayer for relief under the 1976 Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. In December, 1982, the trial court conducted hearings on the issue of attorney's fees. On February 23, 1983, the court awarded plaintiffs' fees and costs of approximately $139,500 or less than ten percent of the amount requested.[2] The discrepancy between the amount requested and that awarded formed the basis of plaintiffs' appeal.

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[2] In its motion for attorneys fees, plaintiff requested the following amounts for services rendered in the 28-year history of the case:

(1) Avon Williams, for the firm of Looby and Williams, 917.8 hours at $200 per hour and 36.4 days at $1,500 a day, totaling

Specifically, plaintiffs alleged error in the district court's refusal to award attorney's fees for services rendered prior to 1972, for declining to award fees for appellate services, and for abusing its discretion in calculating the daily and hourly rates of plaintiffs' attorneys Avon Williams and Richard Dinkins. The defendant Board's cross-appeal challenged the district court's failure to discern the specific extent to which plaintiffs prevailed on each of their claims, and in holding the Board liable for services required by plaintiffs' attorneys due to the intervention of third parties.

The district court's denial of attorney's fees for services performed prior to 1972 was predicated on the court's determination that a 1971 desegregation order, entered by the district court and approved by the Sixth Circuit, was a "final order" which terminated entitlement to attorney's fees under this court's mandate in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

In *Northcross, supra,* this court cautioned that although attorney's fees could be awarded retroactively in all desegretation cases pending at the date of § 1988's enactment, such retroactive relief was not automatic. The court stated:

> This is not to say that a retroactive award of attorney's fees must be made in all school desegregation cases. Certain interim aspects of the case may have been subject to a final order settling the issue of attorney's fees to that point,

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$238,160 plus a 100 percent contingency factor for a total of $476,320;

(2) Avon Williams, individually, 1,211.5 hours at $200 per hour and 87.3 days at $1,500 a day, totaling $372,250 plus 100 percent contingency factor for a total of $746,500;

(3) Richard Dinkins, individually, 215.6 hours at $120 per hour and 38 days at $1,500 a day, totaling $82,872, plus a 100 percent contingency factor for a total of $165,744.

An additional $126,000 was requested for work performed by Legal Defense Fund attorneys.

> rendering the reopening of long-settled aspects of the case unfair.

611 F.2d at 635.

Based on the above guidance, the *Northcross* district court held on remand that a 1966 consent order entered in the Memphis school desegregation case constituted a final order, thus barring an award of attorney's fees for work completed prior to 1966.

In the instant case, the court below concluded that the 1971 order of the district court, affirmed in *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972), constituted a "final order" as did the 1966 consent decree at issue in *Northcross.* This court, however, is not persuaded by that conclusion.

In upholding the lower court's sanctioning of the HEW plan in 1972, this circuit initially observed:

> The order of the District Judge is the first comprehensive and *potentially effective desegregation order* ever entered in this [17 years of] litigation. The District Judge tells us that now *the remedy is at least in sight.*

463 F.2d at 734.

Consequently, this court observed in 1972 that the only issues of substance presented in that appeal were the "practical problems which appellants claim have developed since the entry of the district judge's [1971] order", 463 F.2d at 744, such as the lengthy bus rides to which youngsters were subjected as part of the desegregation plan. However, the Sixth Circuit directed the parties to seek a remedy for these problems in the district court. The court instructed:

> As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims are presented in a trial court, with an oppor-

> tunity for sworn testimony to be taken and controverted issues of facts decided by the processes of adversary hearing, this court has no jurisdiction.

463 F.2d at 744-745.

The 1972 Sixth Circuit opinion further related that documents included in the appellate record suggest "that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge," 432 F.2d at 745. The 1972 appellate decision thus concluded:

> The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been) to the parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future.

463 F.2d at 747.

Thus, it is clear that the Sixth Circuit did not view the 1971 order as signaling the termination of the litigation. Moreover, the record is replete with disclosures that the plaintiffs, as well as defendants, have continously engaged in adversary proceedings of magnitude in conjunction with the modification and implementation of the 1970 plan with charges and countercharges of asserted disparate treatment of black children.[3] As

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[3] For example, on October 21, 1971, plaintiffs moved to join the metropolitan government, mayor and council members as parties due to the control these officials exhibited over the financial resources necessary to implement the transportation aspect of the plan; on March 17, 1972, the Board submitted its second report to the court in which it suggested, *inter alia*, plans for a new high school and a capital improvement schedule for schools which were at least 15% black; in June, 1972, the Board sought changes in the 1971 plan concerning elementary and junior high school attendance zones which plaintiffs opposed while reiterating their claims that the plan in effect had a

recently as 1982, this circuit again remanded the case, concluding that "[i]n large measure, the pupil assignment components of this plan do not withstand constitutional scrutiny." *Kelley,* 687 F.2d at 817.

In view of the foregoing, it is quite apparent that the 1971 district court's disposition and this court's subsequent 1972 affirmance of that decision, did not represent a distinct break in the litigation. Accordingly, as envisioned by the Sixth Circuit in *Northcross,* an award of fees for legal services performed and accrued prior to 1972 is appropriate.

The trial court having initially disallowed attorneys fees for the period between the inception of this action on September 23, 1955, and May 30, 1972, is directed upon remand to conduct hearings and award attorneys fees for services performed at the trial and appellate levels by determining and applying the prevailing daily hourly rate, daily in-court time, and other awardable fees for each year of the period involved.

Plaintiffs have also challenged the trial court's refusal to award attorney's fees for services performed by their counsel at the appellate level. Compensation was sought, *inter alia,* for appellate services which culminated in this court's 1972 and 1982 *Kelley* opinions. *See,* 463 F.2d 732, 687 F.2d 814.

The court below predicated its denial of legal fees for the appellate litigation on *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982). In *Buian,* the court announced that the award of costs to a litigant pursuant to the Federal Rules of Appellate Procedure was an absolute prerequisite to the award of attorney's fees under § 1988 for services resulting from the pursuit of appellate

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disparate impact on black children; and on May 20, 1973, the Board petitioned for approval of its "Long Range Building Program". In sum, the district court's docket sheet evinces a steady stream of activity from the initiation of this litigation to the date of the present appeal.

review. Because costs were not awarded by this court to the plaintiffs at the conclusion of the various appellate proceedings entertained by this court, the district court applying *Buian* barred compensation for their attorneys' services.

Upon a reconsideration of *Buian* and its mandates, this court concludes that an award of costs pursuant to Fed.R.App.P. 39(a)[4] is separate and distinct from and totally unrelated to an award of attorney's fees pursuant to the directions of § 1988. Accordingly, *Buian* is hereby overruled. While it is true that § 1988 expressly states that attorney's fees "*may* be awarded as part of costs," neither the legislative history nor the express language of § 1988 mandates the conclusion expressed in *Buian*.[5] *See, Robinson v. Kimbrough,* 620 F.2d 468, 474 (10th

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[4] While Fed.R.App.P. 39(a) sets forth general guidelines for the award of costs on appeal, governing such items as the copying of briefs, appendices and records, it also allows the appellate tribunal wide discretion in reimbursing a party for its expenses. The rule states in pertinent part:

> **Rule 39. Costs**
>
> **(a) To whom allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

[5] The dissent's argument that *Buian's* pronouncements are supported by cases such as *Hutto v. Finney,* 437 U.S. 678 (1978) and *Marek v. Chesney,* 53 U.S.L.W. 4903 (June 27, 1985) is not persuasive. *Hutto* simply determined that attorney's fees may be classified as "costs," and as such, are not subject to eleventh amendment immunity which normally bars monetary damage awards when a state is the defendant in a civil rights action. Similarly, the Court in *Marek,* after reviewing the legislative history, purpose and express language of § 1988 and Fed.R.Civ.P. 68 respectively, concluded that Congress intended the Rule 68's cost sanctions, which are

Cir. 1980) (pre-*Buian* decision expressly rejecting the approach advocated in *Buian*). *See, e.g., Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159, 173 (5th Cir. 1978) (*en banc*), *aff'd* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (recognizing circuit court's discretionary power to award costs and fees arising from appeal pursuant to Rule 39 but remanding to district court as proper forum to determine total cost and fees, including attorney's compensation, for prevailing party in that case); *Willie M. by Singer v. Hunt,* 564 F.Supp. 363 (W.D. N.C. 1983), *aff'd as modified,* 732 F.2d 383 (4th Cir. 1984) (specifically rejecting *Buian* rationale). To the contrary, the relevant inquiry is simply whether the party seeking compensation substantially prevailed at the appellate level. *See, e.g., Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (restating the general rule that prevailing plaintiff should ordinarily recover an attorney fee in civil rights

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mandatorily-imposed upon a party who refuses a settlement offer and who subsequently fails to recover a final judgment greater than the offer, to include attorneys's fees. In determining that the cost-shifting provision of Rule 68 encompasses an award of attorneys fees under § 1988, the *Marek Court,* in footnote 2, distinguished its prior opinion in *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980). The Court observed that, unlike Rule 68, the cost provision at issue in *Roadway* (28 U.S.C. §§ 1920 and 1927) specifically enumerated the type of costs awardable as sanctions under certain circumstances, thus making it inappropriate for the Court to interpret "costs" as including § 1988 attorney's fees. In other words, the *Marek* Court recognized a critical distinction between interpretation of "costs" where the relevant statute sets forth its own definition of the term, as opposed to situations where "costs" are undefined. As appellate Rule 39 specifically delineates the "costs" to which it applies, i.e. the "traditional" costs of printing briefs, appendices, records, etc. the pronouncements of *Marek* render it inappropriate for this court to judicially-amend Rule 39's cost provisions to include § 1988 attorney's fees. In sum, neither *Hutto* nor *Marek* addressed the narrow issue presented by *Buian,* to wit, whether the appellate court's discretionary decision to award or deny costs pursuant to Fed.R.App.P. 39 should be considered an absolute prerequisite to the prevailing party's § 1988 entitlement to attorney's fees for legal services rendered at the appellate level.

cases). Consideration and disposition of this critical issue is pragmatically left to the forum of the trial court. *Northcross*, 611 F.2d at 637. *See also, Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982); *Taylor v. Ouachita Parish School Bd.*, 648 F.2d 959 (5th Cir. 1981); *Molina v. Richardson*, 578 F.2d 846 (9th Cir.), *cert. denied*, 439 U.S. 1048 (1978).[6]

In addition to challenging the lower court's exclusion of time accrued for pre-1972 and appellate work, plaintiffs urge that the hourly and daily rates awarded by the lower court for legal services rendered subsequent to May 30, 1972, by Avon Williams and Richard Dinkins were inadequate. Compensation at the rate of $200 per hour and $1,500 per day in court was requested for Williams, and $120 hourly and $1,500 per day sought for Dinkins' services. Subsequent to evaluating the prevailing rate charged by experienced and skillful lawyers in the Nashville area, the court below determined that the market rate in federal court litigation for an attorney of Williams' experience, ability and stature was $100 per hour and $1,000 per day of trial. The rate for Dinkins, who was introduced into the case upon gaining admission to the bar, was $60 per hour and $600 per day in court. The court also rejected plaintiffs' prayer for a 100 percent contingency factor, but approved a 25 percent upward adjustment to compensate for the difficulty of the prolonged litigation and its unpopularity in some sectors of the community. The court then reduced the amount 10 percent to account for duplication of services and possible miscalculations in the attorneys' reconstruction of their time records.

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[6] Contrary to the concerns articulated by the dissent, the majority does not foresee its opinion as impacting or overruling the decision in *Johnson v. Snyder*, 639 F.2d 316 (6th Cir. 1981) (per curiam), as *Johnson* merely concluded that since § 1988 attorney's fees may be considered as part of costs, the filing of petition for attorney's fees is not governed by the time limitations of Fed.R.Civ.P. 59 for motions to alter or amend the judgment or for a new trial.

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), the Fifth Circuit listed 12 factors to be considered in determining an appropriate award of attorney's fees. These factors include, *inter alia*, the time and labor required, the novelty and difficulty of the litigation, the customary fee, and the experience, reputation and ability of the attorneys. In *Northcross*, this court observed that *Johnson* did not provide guidance as to the relative weight to be accorded each factor, and suggested that "an analytical approach" be applied. *Northcross* instructs:

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all of the relevant factors and will lead to a reasonable result. The number of hours of work automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and the "experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesireability" of the case.

611 F.2d at 642-43.

Fairly read, *Northcross* advises that the attorney's normal hourly billing rate should be a key focal point in award determinations. In the recent case of *Blum v. Stenson*, ____ U.S. ____, 104 S.Ct. 1541 (1984), the Supreme Court further instructed that "reasonable rates" are to be determined under § 1988 "according to the prevailing market rates in the relevant community." 104 S.Ct. at 1547.

In contesting the $100 per hour award to Williams, plaintiffs cited testimony adduced at the hearing on the motion for fees evincing (1) Williams' reputation as an experienced and successful civil rights lawyer; (2) that "customary fees" for similar

work in the Nashville area ranged from $100 to $200 an hour; (3) that Williams hourly fee for office work was $120; and (4) that the unpopularity of the case has resulted in threats against Williams. Testimony that the standard fee for someone of Dinkins' stature was $65 to $130 an hour was also cited to support plaintiffs' contention that Dinkins' award was inadequate. In addition, plaintiffs recounted the unpopularity and length of the litigation in arguing that the contingency fee should be higher than the 25 percent awarded by the court below.

Considering in tandem the pronouncements of the Supreme Court and Sixth Circuit delineating the correct method for caluclating attorney's fees, this court concludes that Williams is entitled to at least a minimum rate of $120 per hour. This amount is a reasonable point of departure in calculating Williams' hourly rate in accordance with prevailing Supreme Court and this circuit's directions and is within the parameters of the evidence that "customary fees" for similar work in the Nashville area ranged between $100 and $200 an hour. The award to Dinkins must also be reconsidered using as a minimum point of departure an amount of $65 per hour as the prevailing value of his skills in the Nashville legal community. The daily (in court) rate for Williams and Dinkins should also be upgraded to $1,200 and $650 respectively.

The lower court's overall reduction of fees by 10 percent for duplication of services is justified under the holdings of *Weisenberger v. Huecker*, 593 F.2d 49, 54 (6th Cir. 1979) and *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 715 n.2 (6th Cir. 1976) (per curiam). In addition, the Supreme Court recently approved a 30 percent overall reduction in a case, like the one at bar, where the attorneys failed to keep contemporaneous time records and thus had to reconstruct them from memory. *See Hensley v. Eckerhart*, 461 U.S. 424, 428, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). However, the reduction in *Hensley* was also designed to compensate for the attorney's inexperience. Thus, the 10 percent reduction in the instant case is reasonable and should not be disturbed.

Plaintiffs also challenged the district court's refusal to award fees for the two days and seven hours plaintiffs' attorneys attributed to discussions with Dr. Scott, the plaintiffs' expert witness at the 1979 and 1980 hearings. The court's opinion was based on its finding that Dr. Scott's testimony was frivolous under *Northcross,* 611 F.2d at 636, in light of plaintiffs' repudiation of much of Dr. Scott's testimony after the court had admitted it. The district court's conclusion in this respect is proper.

In its cross-appeal, the defendants alleged that the trial court erred in failing to exclude fees for services rendered by plaintiffs' attorneys arising from claims and proceedings stemming from the intervention or joining of other parties. These "outside" parties were:

1. The Metropolitan (Nashville/Davidson Co.) Mayor and Council, which plaintiffs joined as defendants in 1972. (Plaintiffs prevailed in their effort to enjoin these defendants from interfering with the desegregation plan.)

2. The intervention by the Board itself as a third party plaintiff in 1973 to present its claim against third-party defendant HEW.

3. A group of otherwise unidentified "intervenors" who proposed a desegregation plan to the district court in 1979.

4. Another unidentified group of intervenors who entered the case to propose the creation of a magnet school.

The defendant Board further noted that it vehemently opposed the intervention of the third and fourth group of intervenors listed above.

Plaintiffs responded to the Board's argument on this issue by observing that it was the Board's failure to dismantle its dual

school system that occasioned the interventions and prolonged the litigation in this lawsuit.

Defendants relied primarily on *Haycraft v. Hollenbach,* 606 F.2d 128 (6th Cir. 1979) (per curiam) for the proposition that plaintiffs should look to the intervenors, rather than the defendant, for expenses occurred as a result of the intervention. However, *Haycraft* is distinguishable from the instant case in several important respects.

In *Haycraft,* L. J. Hollenbach, a county judge of Jefferson County, Kentucky, intervened on behalf of "all the people of Jefferson County" in a desegregation case pending in federal court. The judge proposed an alternative desegregation plan which protracted the litigation and resulted in several appeals. Following the appeals, the original plaintiffs sought an award of attorney's fees to be assessed against the intervenor pursuant to the Emergency School Aid Act of 1972, 20 U.S.C. § 1617. In granting the order, the district court held the $11,312 award against the intervenor appropriate, as plaintiffs would have saved countless hours were it not for the intervenor. On appeal, this circuit affirmed the award, holding that the plaintiffs became the "prevailing party" as regarded Hollenbach "when the district court rejected his desegregation plan and dismissed him as an intervenor." 606 F.2d at 132.

Thus, the award assessed against the intervenor in *Haycraft* was predicated on the court's finding that the intervenor obstructed rather than aided in the developement of the court-ordered desegregation scheme. The award was also sought by the plaintiffs directly from the intervenor. In the instant case, there is no evidence that the intervenors in any way interferred with the progress of the litigation, and thus plaintiffs would not, under the *Haycraft* analysis, be entitled to remuneration *from the intervenors.* The question remains, of course, whether the plaintiff is entitled to attorney's fees *from the Board* for the extra time which the plaintiffs' counsel devoted to issues raised by the intervenors.

There appears to be no case which directly resolves this issue. Common sense dictates that the Board should not be held liable for the costs plaintiffs incurred in seeking an injunction against the Metropolitan Mayor and Council, as that group was itself a third-party defendant, unrelated to the Board. Thus, if any party is liable for those expenses, it would be the Metropolitan government and not the Board. As to the other intervenors, however, (i.e. the Board itself as a third-party plaintiff, the group which proposed a desegregation plan in 1979, and the advocates of the magnet school) plaintiffs' argument that the Board's failure to dismantle its dual school system caused the intervention is persuasive. Thus, plaintiffs are entitled to compensation from the Board for all legal services except those resulting from plaintiff's addition of the Metropolitan mayor and Council as third-party defendants.

Defendant's final argument on cross appeal was that the court erred in not determining the specific extent to which plaintiffs had prevailed in the action. The defendant contended that while the court's focus on the "overall results" of the case was sufficient to satisfy the "prevailing party" requirement as defined by this circuit in *Northcross,* a recent Supreme Court decision has changed the standard. Defendant cites *Hensely v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) for the proposition that the *Northcross* approach has been modified, and that awards under § 1988 now require that a party's request for attorney's fees be carefully scrutinized as to the extent of success on each claim, and further, that time spent on unsuccessful claims that are distinct from successful claims should be excluded in determining a reasonable fee.[7] Thus,

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[7] Specifically, defendant alleged that plaintiffs have been erroneously awarded fees for time spent pursuing unsuccessful charges of contempt against the Board, yet unresolved matters as to faculty composition, and their effort to keep Pearl High School open.

defendant suggested that under the mandate of *Hensley,* the case should be remanded with instructions to examine the extent to which plaintiffs have prevailed on each substantive issue before awarding fees. The court agrees.

In *Hensley,* plaintiffs brought a lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Missouri. The complaint challenged the treatment and conditions at the Forensic Unit presenting a wide variety of alleged constitutional infringements. The court found constitutional violations in five or six general areas cited in plaintiffs' complaint: physical environment; individual treatment plans; least restrictive environment; visitation, telephone and mail privileges; and seclusion and restraint. However, it found the sixth general area, staffing, to be sufficient.

In ruling on an attorney's fees motion, the *Hensley* district court first determined that plaintiffs were prevailing parties even though they had not succeeded on all six claims, and further refused to eliminate from the award hours spent on the unsuccessful claim. The Supreme Court reversed and remanded, reasoning that two questions must be addressed when a motion for attorney's fees is presented in a case involving numerous claims: (1) did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?; and (2) did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? 461 U.S. at 434; 103 S.Ct. at 1940.

However, *Hensley* does not, as defendant suggested, represent a *total* break from the approach taken regarding the "prevailing party" issue by this circuit in *Northcross.* Rather, the *Hensley* court noted that in some cases, the litigation cannot be "viewed as a series of discrete claims." *Id.* In such a case, the Court stated, the *overall result* would remain as the primary factor in determining attorneys fees.

The *Hensley* court instructs:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtainted by the plaintiff in relation to the hours reasonably expended on the litigation.

461 U.S. at 435, 103 S.Ct. at 1940.

On remand, the district court must follow the mandates of *Hensley* as explicated above.

In sum, this court finds the amounts awarded by the lower court inadequate.[8] This case is therefore remanded to the district court with instructions to award fees for services performed by plaintiffs' attorneys prior to 1972; award fees for appellate work; reevaluate the hourly rate to be awarded to Williams and Dinkins for the period subsequent to May 30, 1972 in accordance with the direction of this decision; reevaluate the court time for Williams and Dinkins with a minimum departure point of $1,200 and $650 respectively for the period subsequent to May 30, 1972; decrease the award for the time spent by plaintiffs' attorneys to bring in the city government as a third party defendant; follow the mandate of *Hensley* to determine which claims plaintiffs have succeeded upon and those which they have not, and to calculate the at-

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[8] This court also notes that the *entire* amount awarded to plaintiffs' attorneys for 28 years of service in this case was less than one-half of the $288,000 which the Board paid its attorneys to defend against the litigation in just one five-year period, i.e. 1978-1982.

torneys' compensable hours accordingly; allow a 25% increase as a contingency factor; and decrease the overall award by 10% for duplication of services and the reconstruction of time records from memory.

In view of the foregoing, this case is Reversed and Remanded. Costs awarded to plaintiffs.

. KENNEDY, Circuit Judge, concurring in part and dissenting in part, joined by ENGEL and WELLFORD, JJ. I concur in the court's holding that the 1971 desegregation order did not constitute a distinct break in the litigation. I dissent, however, from the majority's decision to overrule *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982). I remain convinced that the award of costs on appeal is a prerequisite to the award of appellate attorney fees under 42 U.S.C. § 1988.

The statutory authorization for attorney fees in civil rights cases provides that

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

Traditionally, the Supreme Court, the courts of appeals and the district courts each issue cost awards only for the proceedings within their own sphere. Rule 39(a) of the Federal Rules of Appellate Procedure governs the award of costs on appeal. It provides that costs shall be awarded to the prevailing party, unless otherwise ordered. Where each party prevails in part, costs are allowed only as ordered by the court. Normally, a prevailing party receives costs and a partially prevailing party

receives partial costs.[1] In the rare situation where the appellate court disallows costs entirely, the court very likely has a good reason for doing so, a reason which may or may not be apparent to the district court when it decides the subsequent motion for attorney fees. I do not see how we can allow a district court the discretion to award appellate attorney fees "as part of the costs" when we have refrained from awarding costs.[2]

Moreover, I do not see how we can, consistent with the Eleventh Amendment, allow an award of attorney fees against a state other than as part of costs. Section 1988 does not expressly abrogate Eleventh Amendment immunity, *cf. Atascadero State Hospital v. Scanlon,* 105 S.Ct. 3142, 3148 ("Congress must express its intention to abrogate the Eleventh Amendment in un-

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[1] If there is an appeal and a cross appeal and the plaintiff prevails on one and loses on the other, costs would ordinarily be awarded only on the successful appeal. Although the attorney's servcies could not readily be divided, under *Hensley v. Eckerhart,* 461 U.S. 424 (1983), the fee award could be reduced according to the degree of success. This need not involve the courts of appeals in determining the amount of the fees. The court need only state in its award of costs that attorney fees should be reduced by the appropriate percentage because of the limited success.

[2] I am not insensitive to the harshness of disallowing attorney fees in the instant case because of the absence of cost awards. I do not know why the panels in the 1972 and 1982 *Kelley* decisions ordered each party to bear its own costs on appeal. Appeliants prevailed on the school district's appeal in 1972 and also prevailed in 1982. If it was through inadvertence, or through a perception that each party had partially prevailed and the costs balanced out, the cost issue could have been made the subject of a motion for rehearing by appellants, in anticipation of seeking attorney's fees. Appellants never filed such a motion. The 1982 *Kelley* case, however, was decided six weeks prior to *Buian* and appellants might reasonably not have realized what the failure to award costs portended for their impending attorney's fee motion. Because of the harshness of the result, we might decline to apply *Buian* in the present case. I would prefer this approach to the majority's discarding of *Buian.*

mistakable language in the statute itself"), and the Supreme Court has upheld § 1988 fee awards against states only because they are part of costs:

> The Act imposes attorney's fees "as part of the costs." Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.
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> . . . .
>
> Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs.
>
> There is ample precedent for Congress' decision to authorize an award of attorney's fees as an item of costs... It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the State's immunity.

Hutto v. Finney, 437 U.S. 678, 695-98 (1978) (citations and footnotes omitted).

As recently as this term, the Court has shown that it regards the "as part of the costs" language as more than mere surplusage. In *Marek v. Chesny*, 105 S.Ct. 3012, the Court held that the "costs" contemplated by Federal Rule of Civil Procedure 68 — which shifts to the plaintiff all costs incurred subse-

quent to a rejected settlement offer which is not exceeded by the eventual recovery — include attorney's fees awardable under § 1988. Plaintiffs in *Marek* had rejected a $100,000 settlement offer in their § 1983 suit, and subsequently won only a $60,000 judgment. Thus, under Rule 68, plaintiffs could not recover "costs" incurred during the period after the settlement offer. Plaintiffs nonetheless sought attorney's fees for that period. The Court ruled that since § 1988 defined attorney's fees as costs, fees could not be awarded for any period for which costs were not awarded:

> Pursuant to . . . § 1988, a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." Since Congress expressly included Attorney's fees as "costs" available to plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68.

105 S.Ct. at 3017.

In dissent, Justice Brennan argued that it was wrong to let a determination of attorney's fees, which is governed by a reasonableness standard, be subordinated to and subsumed by a rule on costs, which may have a much more mechanical application. 105 S.Ct. at 3020-21. In the instant case, I take it that essentially this sentiment underlies the majority's decision to reverse *Buian*. But the Supreme Court rejected that argument in favor of the "plain language" view that since attorney's fees are defined as part of costs, they cannot be separately awarded where costs are not awarded.

Notwithstanding all of this, the majority, with an absence of analysis and a dearth of support, "concludes that an award of costs pursuant to Fed.R.App.P. 39(a) is separate and distinct from and totally unrelated to an award of attorney's fees pursuant to the directions of § 1988." The majority adds that "[w]hile it is true that § 1988 *expressly* states that attorney's fees 'may be awarded as part of the costs,' neither the legislative history *nor the express language* of § 1988 mandates the conclu-

sion expressed in *Buian.*" (Emphasis added). I do not know what that "express language" mandates if not *Buian's* conclusion. The refusal to award costs precludes the award of any part of the costs, and the express language of section 1988 defines attorney's fees as part of the costs, as discussed in *Hutto* and *Marek*.

The majority cites two cases as support for rejecting the *Buian* approach. While the district court in *Willie M. by Singer v. Hunt,* 564 F. Supp. 363 (W.D.N.C. 1983), did explicitly reject *Buian,* the majority's subsequent history of *Willie M.* as "*aff'd as modified*" disguises the Fourth Circuit's partial reversal.

In *Willie M.,* the plaintiffs prevailed overall in a class action, but defendants prevailed on one issue — the scope of the class — which was the subject of an independent appeal. The appellate court awarded no costs on that appeal. Nonetheless, the district court allowed plaintiffs to recover attorney's fees, including fees for time spent on the lost appeal, because they had largely prevailed overall. The Fourth Circuit reversed that part of the decision and disallowed attorney fees for the lost appeal because plaintiffs had not prevailed — precisely the reason, of course, that costs had not been awarded. *See Willie M. v. Hunt,* 732 F.2d 383, 386-87 (1984). Thus, the Fourth Circuit reversed the district court on the very issue that brought *Buian* into play, albeit in such a way that the court avoided altogether a *Buian*-type question.

Not only was the *Willie M.* district court reversed,[3] but one of the cases it relied upon in rejecting *Buian* had been reversed by

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[3] In addition to *Willie M.,* the majority cites *Robinson v. Kimbrough,* 620 F.2d 468 (10th Cir. 1980), in which the court did allow an attorney's fee award where costs had been denied. Aside from my plain disagreement with the *Robinson* holding, it does not appear that a *Buian*-type question was squarely addressed by that court.

the Supreme Court. *White v. New Hampshire Department of Employment Security,* 629 F.2d 697 (1st Cir. 1980), had held that Fed.R.Civ.P. 59(e)'s time limit on motions to alter or amend judgments applied to motions for attorney's fees. The court rejected the argument that fees are more like costs than like part of the judgment and thus should be governed by Fed.R.Civ.P. 54(d), which contains no time limit.

The Supreme Court, however, reversed *White, see* 455 U.S. 445 (1982), holding that a motion for attorney's fees was not like a motion to alter or amend the judgment and so not subject to Rule 59(e). The Court declined, though, to rule specifically on whether a request for fees was an application for costs, as three circuits had held, *see Johnson v. Snyder,* 639 F.2d 316, 317 (6th Cir. 1981);[4] *Bond v. Stanton,* 630 F.2d 1231, 1234 (7th Cir. 1980); *Knighton v. Watkins,* 616 F.2d 795, 797-98 (5th Cir. 1980), or was a third kind of creature, related neither to costs nor judgment, as the Eighth Circuit had held in *Obin v. District No. 9 International Association of Machinists and Aerospace Workers,* 651 F.2d 574 (1981), and as the Ninth Circuit later held in *Metcalf v. Borba,* 681 F.2d 1183 (1982).[5]

It appears that the majority now tacitly adopts the *Obin* view that a claim for attorney's fees is not a request for costs nor part of the judgment but "a matter collateral to and independent of the merits of the litigation." 651 F.2d at 583. Justice Blackmun's concurring opinion in *White* called for the Court to go "one step further" and affirmatively adopt the *Obin* view rather than the "costs" view of *Johnson, Bond* and *Knighton.*

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[4] In *Snyder,* we held that "attorney's fees awarded under § 1988 are awarded as costs and are not controlled by the time limitations" of Rule 59(e). 639 F.2d at 317. The majority's opinion would seem necessarily to overrule *Snyder* as well as *Buian.*

[5] The *Willie M.* district court relied on *Obin* and *Metcalf* in addition to *White.*

See 455 U.S. at 455-56. Evidently, a majority of the Court was not willing to do that. Nor am I.

I also dissent from the holding that the District Court abused its discretion in awarding Mr. Williams an hourly rate of $100 for all hours since 1972. The evidence was that rates for attorneys with Mr. Williams' experience were from $100 to $200 per hour at or about the time of the hearing in 1982. However, $100 per hour was the generally prevailing rate. There was also undisputed testimony that rates generally were lower in the early and middle 1970's. The court relies on Mr. Williams' testimony that he charges $120 per hour. It overlooks his testimony that he began charging $120 per hour in January 1981. (App. at 783). Based on the evidence before it, I do not believe the District Court abused its discretion by adopting the $100 rate, although it might have been preferable to approve a lower rate for earlier years and a higher rate for later years.

WELLFORD, Circuit Judge. (Concurring in part and dissenting in part.) I concur with Judge Kennedy in her discussion and reiteration of the rationale of *Buian v. Boughard*, 687 F.2d 859 (6th Cir. 1982).

I concur in Judge Krupansky's opinion to the extent it approves of the district court's overall reduction of fees by 10 percent for duplicaiton of services. The opinion observes that a *larger reduction* under appropriate circumstances may be justified where there has been a failure "to keep contemporaneous time records." The fact that only a modest reduction was directed by the trial judge is evidence of a sensitive and understanding approach by him in considering all of the aspects of the attorney fee request in this case under standards set by the Supreme Court.[1]

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[1] "Where the documentation of hours is inadequate, the district court may reduce the award accordingly. The district court also should exclude from this initial fee caluclation hours that were not 'reasonably expended.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983).

I also concur in the court's judgment that the district court's conclusion properly refused to award fees for the period during 1979 and 1980 hearings when the essentially frivolous testimony of plaintiffs' expert witness, Scott, was discussed and produced but later repudiated. I agree, furthermore, that defendant Board should not be held liable for the costs plaintiffs incurred in seeking an injunction against the Mayor and Council, since the latter, if anyone, should be responsible, rather than defendant Board, for those expenses. In addition, I agree that there should be a remand to consider to what extent, if at all, plaintiffs should be considered "prevailing parties" on certain issues still pending, or in respect to charges or claims in which plaintiffs failed to succeed before the trial court (or this court). *See Hensley v. Eckerhart*, 461 U.S. 424 (1983) (a case in which some of plaintiffs' counsel participated as did the Attorney General of the State of Tennessee by amicus brief).[2] The district court, on remand, may find some of the claims made by plaintiffs essentially "unrelated" to those on which plaintiffs were found to prevail. *See Hensley*, 461 U.S. at 435. As the Supreme Court stated:

> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole time a reasonable hourly rate may be an excessive amount.
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> That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.
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[2] It should be noted that the successful plaintiffs' attorney in *Hensley* claimed nearly 3000 hours of time and requested a rate of *$40 to $65 an hour from 1975 through 1979.*

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for limited success. The court necessarily has discretion in making this equitable judgment.

Hensley, 461 U.S. at 436-37.

I respectfully dissent, however, from other portions of the majority opinion. I would hold *Buian v. Baughard*, 687 F.2d 859 (6th Cir. 1982) to be essentially sound in requiring a determination about allowance of costs as a condition for subsequent allowance of fees in civil rights attorney fee award requests. *Buian* is not inconsistent with the practice of pragmatic referral to the district court for determination of the reasonable amount of an attorney fee award in a proper case. *See Smith v. Detroit Board of Education*, 728 F.2d 359 (6th Cir. 1984). I would not overrule *Buian*, and I would affirm the judgment below to the extent that it applied *Buian* to reduce a portion of the fee request.

With regard to the hourly and daily rates awarded to counsel Williams and Dinkins, remembering that "the fee applicant bears the burden of establishing entitlement . . . and documenting the appropriate hours and hourly rates," and emphasizing that "the district court has *discretion* in determining the amount of a fee award," *Hensley*, 461 U.S. at 437, (emphasis added), I would affirm the district court's action as being within his sound discretion. Much of the fee award claim in this case goes back to services rendered a number of years ago when, in Tennessee, it was rare for an attorney in any case to claim an hourly or daily fee equal to that awarded by the district court in this case. It should be remembered that plaintiffs' attorneys are en-

titled only to an award for reasonable value of their services.[3] In perhaps this court's most frequently cited case dealing with attorney fees in a comparable school desegregation situation,[4] reference was made to an allowance of fees through 1977 to an experienced and successful civil rights lead counsel, Louis Lucas, who requested $75 an hour for services in a 1977 hearing. That same attorney, involved in numerous school desegregation cases in this Circuit (as has been Mr. Williams, one of the claimant's here), requested an hourly fee of $125 an hour for services in a 1978 hearing in the Memphis desegregation case. He was awarded $75 an hour by this court for non-courtroom time because the requested rate was found to be too high. *Northcross,* 611 F.2d at 641. In that same case, another experienced civil rights plaintiff attorney, William Caldwell, requested $60 an hour for his services under the 1976 Civil Rights Attorney's Fees Awards Act; Elijah Noel, Jr., in a comparable position with Mr. Dinkins, requested $50 an hour for his services to plaintiffs through 1977, $60 thereafter. *Id.*

In *Oliver v. Kalamazoo Board of Education,* 576 F.2d 714 (6th Cir. 1978), another leading school desegregation case comparable to the one at issue, lead counsel Lucas (and others in the category of Mr. Williams)[5] received fees ranging from $60 to $100 an hour for courtroom services, and this allowance, in-

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[3] As a former district judge for many years in the Western District of Tennessee and, before 1971, a practicing lawyer in the largest city in the state, my own experience indicates that Judge Wiseman was, if anything, generous in his award and rate of compensation granted to plaintiffs' attorneys.

[4] *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

[5] Including a judge on this court, then chief counsel for the NAACP Legal & Defense Fund, and a federal district judge in Michigan.

stead of "bonus awards," was approved by this court. Other attorneys in the case for plaintiffs were awarded fees ranging from $35 to $60. *Oliver,* 576 F.2d at 717 n.3. Mr. Williams was awarded total fees of $47,833 by this court arising from his services to plaintiffs as lead counsel over approximately fifteen years in another school case with a similar appellate history, including Supreme Court hearings. *Monroe v. Board of Commissioners of the City of Jackson, Tennessee,* 581 F.2d 581 (6th Cir. 1978). *See also Monroe v. Board of Commissioners of Education of Madison County, Tennessee,* 583 F.2d 263 (6th Cir. 1976). The rates ultimately approved in those cases were less than those approved by Judge Wiseman after the full hearing conducted by him before making his decision.

I therefore depart from the majority view that an increase in hourly rates or daily rates over and above that established in the reasonable discretion of the trial judge, who is familiar with local practice and local fee rates, was mandated. The majority seems unmindful of the Supreme Court's advice:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Hensley, 461 U.S. at 437.

With the contingency factor added in this case, for service beginning in 1972, plaintiffs attorneys are also being rewarded on a substantially higher basis than were plaintiffs' attorneys in *Northcross* and in *Oliver.* No added contingency factor at all was allowed in *Hensley.*

The concurring opinion of Justice Brennan in *Hensley,* 461 U.S. at 455, admonishes:

> If a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide *clearly inadequate* compensation [emphasis added].

Finally, I would affirm the trial judge in his holding that the May 30, 1972 order in this case was a type of "final order settling the issue of attorney's fees to that point." *Northcross,* 611 F.2d at 635. That order, as found by the district court, disposed of all outstanding phases of the case; it was a "discrete step" deciding the then pending issues arising from the change in the law brought about by *Breen v. School Board of New Kent County,* 391 U.S. 430 (1968). As in all substantial school desegregation cases of this type, including the *Northcross* case, the court retained jurisdiction for such implementation that experience and future changing circumstances might bring about. This did not prevent the 1972 order, affirmed by this court, from being the kind of "discrete step or distinct break in the proceedings" described in *Northcross.* It was a comprehensive order directing desegregation of the metropolitan school system from which both sides unsuccessfully appealed up to the United States Supreme Court. There were no further substantial hearings in this case until 1978, further evidencing that the district court was not clearly erroneous in making a factual finding to that effect and limiting the fee award in light of that finding. It is abundantly clear that major school desegregation cases of this kind may extend over many years, but that interim final orders may come about reflecting a distinct conclusion of then pending issues, which in light of the changes in applicable law, (such as *Green, supra,* and *Swann v. Charlotte-Mecklenburg Board,* 402 U.S. 1 (1972)) may be revised to reflect current standards or new, unforeseen conditions.

In sum, I dissent because I believe Judge Wiseman acted fairly and within the bounds of his sound discretion and applied the law reasonably to the facts of the case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 83-5175, 5243

Robert W. Kelley, et al.,
Plaintiffs-Appellants, Cross-Appellees,

vs.

Metropolitan County Board of Education, et al.
Defendants-Appellees, Cross-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee.

Decided and Filed February 12, 1985

Before Edwards* and Krupansky, Circuit Judges; and Celebrezze, Senior Circuit Judge.

Krupansky, Circuit Judge. Plaintiffs Robert W. Kelley and the class he represents appealed and defendant Metropolitan County Board of Education (Board) cross-appealed the district court's award of attorney's fees in this school desegregation case.

Commencing on the heels of the landmark case of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the instant case has spawned volumes of court opinions and orders at both the district and appellate levels. These decisions need not be recounted in detail here. *See, e.g., Kelley v. Metropolitan County Board of Education,* 687 F.2d 814 (1982); *Kelley v. Metropolitan County Board of Education,* 463 F.2d

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* The Hon. George Edwards took senior status January 15, 1985.

732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972); *Kelley v. Metropolitan County Board of Education,* 511 F.Supp. 1363 (M.D. Tenn. 1981). Suffice to say that the litigation undoubtedly required hundreds of hours of work by the plaintiffs' and Board's attorneys.

The plaintiffs' initial motion for attorney's fees, pursuant to the Educational Amendments of 1972, 20 U.S.C. § 1617, was filed on February 8, 1974. Subsequent filings amended the pending motion to include a prayer for relief under the 1976 Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. In December, 1982, the trial court conducted hearings on the issue of attorney's fees. On February 23, 1983, the court awarded plaintiffs' fees and costs of approximately $139,500 or less than ten percent of the amount requested.[1] The discrepancy between the amount requested and that awarded formed the basis of plaintiff's appeal.

Specifically, plaintiffs alleged error in the district court's refusal to award attorney's fees for services rendered prior to 1972, for declining to award fees for appellate services, and for abusing its discretion in calculating the daily and hourly rates of

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[1] In its motion for attorneys fees, plaintiff requested the following amounts for services rendered in the 28-year history of the case:

(1) Avon Williams for the firm of Looby and Williams, 917.8 hours at $200 per hour and 36.4 days at $1,500 a day, totaling $238,160 plus a 100 percent contingency factor for a total of $476,320;

(2) Avon Williams, individually, 1,211.5 hours at $200 per hour and 87.3 days at $1,500 per day, totaling $373,250 plus a 100 percent contingency factor for a total of $746,500;

(3) Richard Dinkins, individually, 215.6 hours at $120 per hour and 38 days at $1,500 a day, totaling $82,872, plus a 100 percent contingency factor for a total of $165,744.

An additional $126,000 was requested for work performed by Legal Defense Fund attorneys, but the denial of this request was not challenged on appeal.

plaintiffs' attorneys Avon Williams and Richard Dinkins. The defendant Board's cross-appeal challenged the district court's failure to discern the specific extent to which plaintiffs prevailed on each of their claims, and in holding the Board liable for services required by plaintiffs' attorneys due to the intervention of third parties.

The district court's denial of attorney's fees for services performed prior to 1972 was predicated on the court's determination that a 1971 desegregation order, entered by the district court and approved by the Sixth Circuit, was a "final order" which terminated entitlement to attorney's fees under this court's mandate in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

In *Northcross, supra,* this court cautioned that although attorney's fees could be awarded retroactively for all desegregation cases pending at the date of § 1988's enactment, such retroactive relief was not automatic. The court stated:

> This is not to say that a retroactive award of attorney's fees must be made in all school desegregation cases. Certain interim aspects of the case may have been subject to a final order settling the issue of attorney's fees to that point, rendering the reopening of long-settled aspects of the case unfair.

611 F.2d at 635.

Based on the above guidance, the *Northcross* district court held on remand that a 1966 consent order entered in the Memphis school desegregation case constituted a final order, thus barring an award of attorney's fees for work completed prior to 1966.

In the instant case, the court below concluded that the 1971 order of the district court, affirmed in *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir.), *cert.*

denied, 409 U.S. 1001 (1972), constituted a "final order" as did the 1966 consent decree at issue in *Northcross.* This court, however, is not persuaded by that conclusion.

The critical distinction between *Northcross* and the instant case is the nature of the orders at issue. In *Northcross,* the 1966 order was the result of a consent decree, drafted by the parties and approved by the district court. No further litigation was contemplated by the parties at that time, and in fact neither party sought additional relief until the Supreme Court rendered its historic decision in *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689 (1968), which clarified plaintiffs' entitlement to a more drastic desegregation plan than that provided in the 1966 consent decree.

In contrast, the 1971 order at issue herein was not a result of an agreement drafted by the parties; to the contrary, the court expressly rejected the desegregation proposals submitted by the Board and the plaintiffs in favor of a plan presented by the Department of Health, Education and Welfare (HEW), an intervenor in the suit. Both the Board and the plaintiffs appealed the adoption of the HEW scheme. And in upholding the lower court's sanctioning of the HEW plan, this circuit observed:

> The order of the District Judge is the first comprehensive and *potentially effective desegregation order* ever entered in this [17 years of] litigation. The District Judge tells us that now *the remedy is at least in sight.*

463 F.2d at 734. Thus, it is clear that neither the parties nor the appellate court viewed the 1971 order as signaling the termination of the litigation. The plaintiffs have continuously sought modification of the 1971 plan and subsequent revisions by the court due to their convictions that the implemented schemes have had a disparate impact on black children. As recently as 1982, this circuit again remanded the case, concluding that "[i]n large measure, the pupil assignment components of this plan do not withstand constitutional scrutiny." *Kelley, supra,* 687 F.2d at 824.

In view of the foregoing, the 1971 district court's adoption of the HEW plan, and this court's subsequent affirmance in 1972, did not represent a distinct break in the litigation. Therefore, an award of fees for legal services performed and accrued prior to 1972 is appropriate.

Plaintiffs have also challenged the trial court's refusal to award attorney's fees for services rendered by their attorneys at the appellate level. Compensation was sought, *inter alia,* for appellate work which culminated in this court's 1972 and 1982 *Kelley* opinions. *See,* 463 F.2d 732; 687 F.2d 814.

The court below predicated its denial of compensation for the services performed by the attorneys in the appellate litigation on *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982). In *Buian,* the court announced that the award of costs to a litigant pursuant to the Federal Rules of Appellate Procedure was an absolute prerequisite to the award of attorney's fees under § 1988 for services performed at that level. As costs were not awarded by this court to plaintiffs in conjunction with their previous appeals, the district court, applying *Buian,* barred compensation for their attorneys' services. However, this court is of the opinion that the district court erred in retroactively applying *Buian* to the case at bar.

To determine whether a particular decision should be given retroactive effect, the test articulated in *Chevron Oil v. Huson,* 404 U.S. 97, 106-107 (1971), must be applied. Under *Chevron,* a new decision should be applied to pending cases "unless it represents a 'clear break' with the past and unless in addition it would be fundamentally unfair or otherwise burdensome to apply it." *Casiano, Jr. v. Heckler,* No. 83-3481 (6th Cir. Oct. 22, 1984) (*quoting, Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100,* 698 F.2d 250, 254 (6th Cir.), *cert. denied,* 104 S.Ct. 69 (1983)). Applying this criteria, it is clear that *Buian* should not be retroactively applied to deny compen-

sation for appellate work performed prior to 1982 by plaintiffs' attorneys.[2]

Regarding the initial criterion of the *Chevron* test, it is obvious that *Buian* represented a "clear break" from past law. Prior to *Buian,* a civil rights litigant simply had to "prevail" on appeal to qualify for attorney's fees for services rendered at the appellate level. *Buian,* however, placed an additional burden on a litigant, i.e., seeking and securing an award of costs from the appellate court pursuant to Fed.R.App.P. 39, as an absolute prerequisite to receiving attorney's fees under § 1988.[3]

As for the other criteria of *Chevron,* this court concludes that it would be fundamentally inequitable to deny plaintiffs' attorneys compensation for appellate work performed prior to the pronouncements of *Buian* in 1982 because plaintiffs failed to secure an award of costs, which was a non-existent prerequisite prior to 1982. A contrary disposition would completely undermine the purpose of § 1988, which was designed to compensate attorneys whose efforts resulted in the vindication of important constitutional rights. *Northcross, supra.* In sum, *Buian* is not applicable to the case at bar for pre-1982 appeals and the trial

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[2] This court takes judicial notice that while at least one *Kelley* appellate decision was rendered the same year as *Buian, see* 687 F.2d at 814, that appeal was argued on December 11, 1981. Thus, the appellate work for which plaintiffs seek compensation was undoubtedly substantially completed well before *Buian* was issued in September, 1982.

[3] The *Buian* court itself recognized the burden which its decision placed on the court as well as on a litigant. The court observd:

> A special responsibility is placed upon the court of appeals in awarding costs in civil rights cases that does not exist in other cases because of the fact that fees for attorney's services on appeal will be denied where costs are not awarded.

687 F.2d at 862, n.5.

court erred in failing to award attorney's fees for work related to those appeals.

In addition to challenging the lower court's exclusion of time accrued for pre-1972 and appellate work, plaintiffs urge that the hourly and daily rates awarded by the lower court for legal services rendered by Avon Williams and Richard Dinkins were inadequate. Compensation at the rate of $200 per hour and $1,500 per day in court was requested for Williams, and $120 hourly and $1,500 per day sought for Dinkins' services. Subsequent to evaluating the prevailing rate charged by experienced and skillful lawyers in the Nashville area, the court below determined that the market rate in federal court litigation for an attorney of Williams' experience, ability and stature was $100 per hour and $1,000 per day of trial. The rate for Dinkins, who was introduced into the case upon gaining admission to the bar, was $60 per hour and $600 per day in court. The court also rejected plaintiffs' prayer for a 100 percent contingency to compensate for the difficulty of the prolonged litigation and its unpopularity in some sectors of the community. The court then reduced the amount 10 percent to account for duplication of services and possible miscalculations in the attorneys' reconstruction of their time records.

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), the Fifth Circuit listed 12 factors to be considered in determining an appropriate award of attorney's fees. These factors include, *inter alia,* the time and labor required, novelty and difficulty of the litigation, the customary fee, and the experience, reputation and ability of the attorneys. In *Northcross, supra,* this court observed that *Johnson* did not provide guidance as to the relative weight to be accorded each factor, and suggested that "an analytical approach" be applied. *Northcross* instructs:

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all of the relevant factors and will lead to a

> reasonable result. The number of hours of work automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and the "experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case.

611 F.2d at 642-43.

Fairly read, *Northcross* advises that the attorney's normal hourly billing rate should be a key focal point in award determinations. In the recent case of *Blum v. Stenson*, ____ U.S. ____, 104 S.Ct. 1541 (1984), the Supreme Court further instructed that "reasonable rates" are to be determined under § 1988 "according to the prevailing market rates in the relevant community." 104 S.Ct. at 1547.

In contesting the $100 per hour award to Williams, plaintiffs cited testimony adduced at the hearing on the motion for fees evincing (1) Williams' reputation as an experienced and successful civil rights lawyer; (2) that "customary fees" for similar work in the Nashville area ranged from $100 to $200 an hour; (3) that Williams' hourly fee for office work was $120; and (4) that the unpopularity of the case has resulted in threats against Williams. Testimony that the standard fee for someone of Dinkins' stature was $65 to $130 an hour was also cited to support plaintiffs' contention that Dinkins' award was inadequate. In addition, plaintiffs recounted the unpopularity and length of the litigation in arguing that the contingency fee should be higher than the 25 percent awarded by the court below.

Considering in tandem the pronouncements of the Supreme Court and Sixth Circuit delineating the correct method for calculating attorney's fees, this court concludes that Williams

is entitled to at least a minimum rate of $120 per hour. This amount is a reasonable point of departure in calculating Williams' hourly rate in accordance with prevailing Supreme Court and this circuit's directions and is within the parameters of the evidence that "customary fees" for similar work in the Nashville area ranged between $100 and $200 an hour. The award to Dinkins must also be reconsidered using as a minimum point of departure an amount of $65 per hour as the prevailing value of his skills in the Nashville legal community. The daily (in court) rate for Williams and Dinkins should also be upgraded to at least $1,200 and $650 respectively.

The lower court's overall reduction of fees by 10 percent for duplication of services is justified under the holdings of *Weisenberger v. Huecker,* 593 F.2d 49, 54 (6th Cir. 1979) and *Oliver v. Kalamazoo Board of Education,* 576 F.2d 714, 715 n.2 (6th Cir. 1976) (per curiam). In addition, the Supreme Court recently approved a 30 percent overall reduction in a case, like the one at bar, where the attorneys failed to keep contemporaneous time records and thus had to reconstruct them from memory *See Hensley v. Eckerhart,* ____ U.S. ____, 103 S.Ct. 1933, 1939 (1983). However, the reduction in *Hensley* was also designed to compensate for the attorney's inexperience. Thus, the 20 percent reduction in the instant case is reasonable and should not be disturbed.

Plaintiffs also challenged the district court's refusal to award fees for the two days and seven hours plaintiffs' attorneys attributed to discussions with Dr. Scott, the plaintiffs' witness at the 1979 and 1980 hearings. The court's opinion was based on its finding that Dr. Scott's testimony was frivolous under *Northcross, supra,* 611 F.2d at 636, in light of plaintiffs' repudiation of much of Dr. Scott's testimony after the court had admitted it. The district court's conclusion in this respect is proper.

In its cross-appeal, the defendants alleged that the trial court erred in failing to exclude fees for services rendered by plain-

tiffs' attorneys arising from claims and proceedings stemming from the intervention or joining of other parties. These "outside" parties were:

1. The Metropolitan (Nashville/Davidson Co.) Mayor and Council, which plaintiffs joined as defendants in 1972. (Plaintiffs prevailed in their effort to enjoin these defendants from interfering with the desegregation plan.)

2. The intervention by the Board itself as a third party plaintiff in 1973 to present its claim against third-party defendant HEW.

3. A group of otherwise unidentified "intervenors" who proposed a desegregation plan to the district court in 1979.

4. Another unidentified group of intervenors who entered the case to propose the creation of a magnet school.

The defendant Board further noted that it vehemently opposed the intervention of the third and fourth group of intervenors listed above.

Plaintiffs responded to the Board's argument on this issue by observing that it was the Board's failure to dismantle its dual school system that occasioned the intervention and prolonged the litigation in this lawsuit.

Defendants relied primarily on *Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979) (per curiam) for the proposition that plaintiffs should look to the intervenors, rather than the defendant, for expenses occurred as a result of the intervention. However, *Haycraft* is distinguishable from the instant case in several important respects.

In *Haycraft*, L. J. Hollenbach, a county judge of Jefferson County, Kentucky, intervened on behalf of "all the people of

Jefferson County" in a desegregation case pending in federal court. The judge proposed an alternative desegregation plan which protracted the litigation and resulted in several appeals. Following the appeals, the original plaintiffs sought an award of attorney's fees to be assessed against the intervenor pursuant to the Emergency School Aid Act of 1972, 20 U.S.C. § 1617. In granting the order, the district court held the $11,312 award against the intervenor appropriate, as plaintiffs would have saved countless hours were it not for the intervenor. On appeal, this circuit affirmed the award, holding that the plaintiffs became the "prevailing party" as regarded Hollenbach "when the district court rejected his desegregation plan and dismissed him as an intervenor." 606 F.2d at 132.

Thus, the award assessed against the intervenor in *Haycraft* was predicated on the court's finding that the intervenor obstructed rather than aided in the development of the court-ordered desegregation scheme. The award was also sought by the plaintiffs directly from the intervenor. In the instant case there is no evidence that the intervenors in any way interfered with the progress of the litigation, and thus plaintiffs would not, under the *Haycraft* analysis, be entitled to remuneration from the intervenors. The question remains, of course, whether the plaintiff is entitled to attorney's fees *from the Board* for the extra time which the plaintiffs' counsel devoted to issues raised by the intervenors.

There appears to be no case law which directly resolves this issue. Common sense dictates that the Board should not be held liable for the costs plaintiffs incurred in seeking an injunction against the Metropolitan Mayor and Council, as that group was itself a third-party defendant, unrelated to the Board. Thus, if any party is liable for those expenses, it would be the Metropolitan government and not the Board. As to the other intervenors, however, (i.e. the Board itself as a third-party plaintiff, the group which proposed a desegregation plan in 1979, and the advocates of the magnet school) plaintiffs' argu-

ment that the Board's failure to dismantle its dual school system caused the intervention is persuasive. Thus, plaintiffs are entitled to compensation from the Board for all legal services except those resulting from plaintiffs' addition of the Metropolitan Mayor and Council as third-party defendants.

Defendant's final argument on cross appeal was that the court erred in not determining the specific extent to which plaintiffs had prevailed in the action. The defendant contended that while the court's focus on the "overall results" of the case was sufficient to satisfy the "prevailing party" requirement as defined by this circuit in *Northcross, supra,* a recent Supreme Court decision has changed the standard. Defendant cites *Hensley v. Eckerhart,* ____ U.S. ____, 103 S.Ct. 1933 (1983) for the proposition that the *Northcross* approach has been modified, and that awards under § 1988 now require that a party's request for attorney's fees be carefully scrutinized as to the extent of success on each claim, and further, that time spent on unsuccessful claims that are distinct from successful claims should be excluded in determining a reasonable fee.[4] Thus, defendant suggested that under the mandate of *Hensley,* the case should be remanded with instructions to examine the extent to which plaintiffs have prevailed on each substantive issue before awarding fees. The court agrees.

In *Hensley,* plaintiffs brought a lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Missouri. The complaint challenged the treatment and conditions at the Forensic Unit as presenting a wide variety of alleged constitutional infringements. The court found constitutional violations in five of six general areas cited in plaintiffs' complaint: physical environment; individual treat-

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[4] Specifically, defendant alleged that plaintiffs have been erroneously awarded fees for time spent pursuing unsuccessful charges of contempt against the Board, yet unresolved matters as to faculty composition, and their effort to keep Pearl High School open.

ment plans; least restrictive environment; visitation, telephone and mail privileges; and seclusion and restraint. However, it found the sixth general area, staffing, to be sufficient. 103 S.Ct. at 1936.

In ruling on an attorney's fees motion, the *Hensley* district court first determined that plaintiffs were prevailing parties even though they had not succeeded on all six claims, and further refused to eliminate from the award hours spent on the unsuccessful claim. The Supreme Court reversed and remanded, reasoning that two questions must be addressed when a motion for attorney's fees is presented in a case involving numerous claims: (1) did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?; and (2) did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award? 103 S.Ct. at 1940.

However, *Hensley,* does not, as defendant suggested, represent a *total* break from the approach taken regarding the "prevailing party" issue by this circuit in *Northcross.* Rather, the *Hensley* court noted that in some cases, the litigation cannot be "viewed as a series of discrete claims." *Id.* In such a case, the Court states, the *overall result* will still be the primary factor in determining attorneys fees.

The *Hensley* court instructs:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

103 S.Ct. at 1940.

On remand, the district court must follow the mandates of *Hensley* as explicated above.

In sum, this court finds the amounts awarded by the lower court inadequate.[5] This case is therefore remanded to the district court with instructions to award fees for services performed by plaintiffs' attorneys prior to 1972; award fees for appellate work; reevaluate the hourly rate to be awarded to Williams and Dinkins in accordance with the direction of this decision; reevaluate the court time for Williams and Dinkins with a minimum departure point of $1,200 and $650 respectively; decrease the award for the time spent by plaintiffs' attorneys to bring in the city government as a third party defendant; follow the mandate of *Hensley, supra,* to determine which claims plaintiffs have succeeded upon and those which they have not, and to calculate the attorneys' compensable hours accordingly; allow a 25% increase as a contingency factor; and decrease the overall award by 10% for duplication of services and the reconstruction of time records from memory.

In view of the foregoing this case is Reversed and Remanded. Costs awarded to plaintiffs.

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[5] This court also notes that the *entire* amount awarded to plaintiffs' attorneys for 28 years of service in this case was less than one-half of the $288,000 which the Board paid its attorneys to defend against the litigation in just one five-year period, i.e. 1978-1982.

APPENDIX C

Robert W. Kelley, et al.,
Plaintiffs,

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.,
Defendants.

Nos. 2094, 2956

United States District Court,
M.D. Tennessee,
Nashville Division.

Feb. 23, 1983.

MEMORANDUM

WISEMAN, District Judge.

I. *Background*

This lawsuit to compel desegregation of the Nashville school system was originally filed in 1955. The long history of this litigation is summarized in *Kelley v. Metropolitan City Board of Education,* 492 F.Supp. 167, 168-78 (M.D. Tenn.1980), and need not be repeated here. The current phase of the litigation involves four distinct topics: (1) pupil assignment; (2) teacher and staff assignment; (3) plaintiffs' request for attorney's fees; and (4) plaintiffs' petition for contempt against defendant school board. The pupil assignment plan took precedence, by agreement of the parties, leaving the three other issues to be resolved at a later date. This Court held hearings on the remaining three issues on December 6, 7, and 8, 1982, at which time the parties reached a consent agreement on the question of teacher and staff assignments.

Plaintiffs now seek an award of attorney's fees pursuant to 42 U.S.C. § 1988. Since 1955, Mr. Avon N. Williams, Jr., has represented the plaintiffs in this action. In the early years of this lawsuit, Williams teamed with his former law partner, Mr. Z. Alexander Looby. Since 1977, Williams has been joined by his associate, Mr. Richard H. Dinkins, in this matter. No attorney's fees have ever been awarded in the history of this litigation.

II. *Preliminary matters*

A. *Applicability of the Civil Rights Attorney's Fees Act*

Defendant school board has not contested plaintiffs' claim that the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, applies to this litigation. The Act declares that, in suits brought under 42 U.S.C. § 1983 and certain other statutes, federal courts may award prevailing parties reasonable attorney's fees as part of the costs. The Act applies to all cases pending on the date of its enactment. *Hutto v. Finney,* 437 U.S. 678, 695 n. 23, 98 S.Ct. 2565, 2575, n. 23, 57 L.Ed.2d 522, 537 (1978). The Sixth Circuit has held that the word "pending"

> . . . means that all the issues in the case have not been finally resolved. So long as there was an active controversy in the case at the time the Act became effective, the Act applies to authorize fees for the entire case, unless special circumstances exist which would make an award manifestly unjust.

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 634 (6th Cir.1979), *cert. denied,* 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).[1]

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[1] *Northcross* also held that the determination of whether fees were to be awarded for the entire case may depend on the existence of a "final order" at any time in the litigation. This specific topic is addressed *infra.*

In *Weisenberger v. Huecker,* 593 F.2d 49 (6th Cir.1979), the merits of the case were resolved well before passage of the Act, but the application for attorney's fees had not been resolved when the Act became effective. The Sixth Circuit held that "[s]ince the Act was in existence at the time the district court made the fee awards, it is applicable to the instant cases." *Id.* at 53.

In this case, plaintiffs requested fees in motions dated February 8, 1974, April 11, 1975, and October 16, 1975. Those motions, and other important motions including substantive issues, were pending when the Act took effect in 1976. Thus, *Weisenberger* and *Northcross* govern, and, as a threshold question, the Act applies

B. *Prevailing party*

As a preliminary matter, plaintiffs must first be found to be the prevailing party before attorney's fees can be awarded under 42 U.S.C. § 1988. Defendants claim that plaintiffs are not the prevailing party because (1) the Board stipulated *ab initio* that its schools were unconstitutionally segregated, and (2) the plaintiffs have never submitted a desegregation plan which has been implemented by the Court.

Defendants' position appears to be an overly narrow approach to the definition of prevailing party. The Sixth Circuit has stated:

> In accordance with the broad remedial purpose of the statute, parties may be considered to have prevailed when they have vindicated important rights through a consent judgment or without formally obtaining relief.

Northcross, supra, at 633.

Adhering to the Sixth Circuit's mandate to look at this question in practical terms, it is clear that plaintiffs in this case are the prevailing party in this litigation. Plaintiffs have clearly

prevailed as to the basic holding of this Court throughout the twenty-seven year course of this case that some type of court-ordered remedy was necessary to alleviate the effects of prior *de jure* segregation.

Furthermore, it is not necessary for plaintiffs to have prevailed on every single legal position or argument asserted. To the contrary, plaintiffs are entitled to fees for "all time reasonably spent on a matter." *Northcross, supra,* at 636. In *Northcross,* the Court stated:

> The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into "issues and parts of issues as to which the plaintiffs did not prevail," especially by decimating the total hours claimed with arbitrary percentages. Suffice it to say, however, that Congress has mandated that a prevailing party's attorney should be compensated "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." We know of no "traditional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail on "issues or parts of issues." Furthermore, it would hardly further our mandate to use the "broadest and most flexible remedies available" to us to enforce the civil rights laws if we were so directly to discourage innovative and vigorous lawyering in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position on their clients' behalf that is possible in good faith. The fact that these lawyers advocated a desegrega-

> tion remedy of broader scope and faster pace than was ultimately adopted cannot be considered to be unreasonable. Their clients have prevailed; the Memphis school system is desegregated.

Id. This approach was recently reaffirmed by the Sixth Circuit. *Buian v. Baughard,* 687 F.2d 859 (6th Cir. 1982) at 862. *Northcross* also allowed fees to be awarded for time spent litigating the fees question itself. *Northcross, supra,* at 643.

Thus, plaintiffs have prevailed and are entitled to fees for all time reasonably spent on matters involved in this case.

III. *Computation of Hours and Fees*

A. *Plaintiffs' Request*

Messrs. Williams and Dinkins have filed affidavits wherein they reconstruct their time spent on this lawsuit. Although Williams and Dinkins have not kept contemporaneously maintained records, they claim that the reconstruction adequately represents the services which they have performed. Plaintiffs request fees in the following amounts:

(1) Avon Williams, for the firm of Looby and Williams, 917.8 hours at $200 per hour and 36.4 days at $1,500 a day, totaling $238,160 plus a 100 percent contingency factor for a total of $476,320;

(2) Avon Williams, individually, 1,211.5 hours at $200 per hour and 87.3 days at $1,500 a day, totaling $373,250 plus a 100 percent contingency factor for a total of $746,500;

(3) Richard Dinkins, individually, 215.6 hours at $120 per hour and 38 days at $1,500 a day, totaling $82,872, plus a 100 percent contingency factor for a total of $165,744;

(4) Norman J. Chachkin, for the Legal Defense Fund, 43 hours at $200 per hour, totaling $8,600, plus a 100 percent contingency factor for a total of $17,200;

(5) Bill Lann Lee, for the Legal Defense Fund, 270.4 hours at $115 per hour, totaling $31,096, plus a 100 percent contingency factor for a total of $62,192;

(6) Legal Defense Fund, costs and expenses totaling $47,488.15.

In awarding fees, a district court is not compelled to accept automatically all the hours claimed, but any reductions must be clearly identified and the reason for dis-allowing claims must be articulated. *Northcross, supra,* at 636-37. This Court will attempt to do just that.

B. *The "Final Order" Question*

At the outset of the hearings held in December 1982, this Court made two rulings from the bench in order to limit the proof at those proceedings. First, this Court held that no fees could be awarded for services rendered prior to May 30, 1972, on which date the Sixth Circuit affirmed the desegregation plan entered by this Court in 1971. Second, this Court ruled that it lacked the authority to award fees for appellate work in this case. That ruling is addressed *infra.*

Turning to the "final order" question, one of the many issues addressed in *Northcross,* the Sixth Circuit there ruled that a prior final order in that school desegregation case could bar an award of fees for services rendered prior to that date. 611 F.2d at 635. After ruling that plaintiffs' attorneys should recover fees which the district court had denied in part, the Sixth Circuit stated:

> This is not to say that a retroactive award of attorney's fees must be made in all school desegregation cases. *Certain interim aspects of the cae may have been subject to a final order settling the issue of attorney's fees to that point, rendering the reopening of long-settled aspects of the case unfair.*

Northcross, supra, at 635. (emphasis added). The Court held that the fee awarded should cover at least back to 1968 when the suit became active again following new pronouncements from the United States Supreme Court which directly affected the Memphis case. The Court said, however:

> There is an unresolved dispute concerning the pre-1968 period, which we leave to the district court to resolve. The School Board contended below that the district court action of July 29, 1966, the last action before the Supreme Court's *Green [v. County School Bd.,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716] decision, was a "consent order" which undertook to dispose of all outstanding phases of the case, including fees and costs. It is true that a long, complicated case of this sort can result in several "final" orders, which in the interests of finality are deemed to dispose of all foregoing issues. Absent a timely appeal, a party is bound by the order and any later challenge is deemed to be a collateral attack judged by different, and more stringent standards than on direct review. *Bradley [v. School Bd. of Richmond*], *supra,* 416 U.S. [696] at 710-11, 94 S.Ct. 2006 [at 2015-16, 40 L.Ed.2d 476]. If the defendants are correct in their characterization of the 1966 action in the interest of finality, plaintiffs should not be permitted to reopen that judgment in order to obtain attorneys' fees. We leave this matter to the district court. However, from 1968 until shortly before the application for fees was made by the plaintiffs, the case was in continuous, active litigation. Not only was there no "final judgment" which could reaonably be said to settle the issue of fees during that period, but there was no time to raise the matter of fees at all.

Id.

On remand, the district court denied plaintiffs' request for fees for services rendered prior to 1968. *Northcross v. Board of*

Education of Memphis City Schools, Civil Action No. 3931, January 14, 1982 (W.D. Tenn.). Judge McRae gave the following explanation:

> The Court finds that the services expended on the portion of the case occurring prior to the filing on 26 July 1968 of plaintiff's motion for further relief should be denied. A plan of desegregation in this cause conforming to what was thought to be the then existing legal standards, was developed and filed jointly by the parties on 22 July 1966. That plan was intended and treated by the parties as a final plan of desegregation, and a distinct break in the proceedings in this case occurred at that time. Previous to that time there had been two appeals taken successfully by the plaintiffs. The 1968 motion for further relief did not grow out of any evident intention of these parties to litigate that plan further, but was the direct result of subsequent Supreme Court decisions in the case of *Green v. County School Board of New Kent County, Virginia,* 391 U.S. 430 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968), and its companion cases which represented very significant new development in the law pertaining to school desegregation. This case at bar is similar to the case of *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir.1978), wherein the Court held that plaintiffs might timely file for a fee resulting from the continuous hearings and appeals on their motion for further relief, but denied a fee for earlier "discrete steps" in the litigation.

Id. at 6, 7.

The immediate question, then, is whether the May 30, 1972, order was the type of "final order," disposing of all issues at that time, contemplated by *Northcross.* This Court holds that the order of the Sixth Circuit on May 30, 1972, upholding the 1971 plan adopted by Judge Morton, was such a final order.

Plaintiffs have argued that the 1972 order was not a *Northcross* style "final order" because:

(1) the 1971 plan was appealed by both parties;

(2) the district court specifically retained jurisdiction;

(3) the plan ws affirmed with the Sixth Circuit observing that matters regarding implementation could "be brought to the District Judge's attention when the case is back before him." *Kelley v. Metropolitan Cty. Bd. of Education,* 463 F.2d 732 at 746;

(4) there were further proceedings in 1971-72 in which the Board was allegedly adjudged to have engaged in bad faith implementation;

(5) plaintiffs continued to seek more effective desegregation and relief for the transportation burden placed on younger black students (Reply of Plaintiffs to Petition of Defendants filed on July 18, 1972, filed August 10, 1972), but those requests were not heard by the Court until 1978; and

(6) defendants sought modifications of the 1971 plan and those requests were also not heard until 1978.

Defendants rely heavily on Judge McRae's opinion in *Northcross* after the Sixth Circuit remanded the case to him to determine whether the 1966 plan in that case was a "final order." The Board stated that the 1972 order in *Kelley,* like the 1966 order in *Northcross,* disposed of all outstanding phases of the case, including fees and costs. Citing language from *Northcross,* the Board calls the 1972 order a "discrete step" which constitutes a final order and precludes a retroactive award of attorney's fees. Furthermore, the Board claims that the precipitating factor for the 1972 order was *Green v. School Board of New Kent County,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), just as it was in *Northcross.*

The Court is not persuaded that the 1972 order cannot be considered "final" due to the fact that unlike the *Northcross* case, there was no consent order agreed upon by the parties

here. An order entered by any court is no less "final" simply because one or more of the parties may have lingering doubts about the conclusion reached by the court. Nor is this Court's immediate decision altered by the fact that this court in 1971 expressly retained jurisdiction in the case. Where equitable relief is sought, a court will often retain jurisdiction to oversee the remedy and monitor its efficacy.

Plaintiffs' claim that no final order was entered because the Sixth Circuit stated that matters involving implementation could be brought to the District Court's attention also fails to support plaintiffs' position. By focusing on the *implementation* of the plan, plaintiffs at the time necessarily acknowledged that the plan adopted was a comprehensive one which addressed all outstanding issues, leaving only matters of implementation to be addressed.

Finally, plaintiffs argue that the 1972 order left open the question of whether the plan adopted by the District Court in 1971 placed a disproportionate burden on young black children. This claim is erroneous. Plaintiffs took that argument to the Sixth Circuit and that Court refused to overturn the District Court's plan in that regard. The Court stated:

> Plaintiffs-Cross-appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.
>
> The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6. In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann*. *Swann v. Board of Education, supra,* 402 U.S. [1] at 10, 91 S.Ct. 1267 [at 1273], 28 L.Ed.2d 554. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can ap-

> propriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

463 F.2d at 746. Although the Court stated that the District Court could, at a later date, evaluate any adverse effects of the plan, plaintiffs' specific claim was heard and rejected on May 30, 1972, when the Sixth Circuit ruled that the District Court had not abused its discretion. Thus, as of May 30, 1972, there were no unresolved issues in the case.

This Court agrees with the defendants' characterization of the 1972 order as a "discrete step" which constituted a "distinct break in the proceedings" at that time. *See Northcross*, Civil Action No. 3931, January 14, 1982 (W.D.Tenn.). At the time of the 1972 order, the Sixth Circuit clearly viewed the 1971 plan as a "discrete step," saying:

> The order of the District Judge is the first comprehensive and potentially effective desegregation order ever entered in this litigation. The District Judge tells us that now the remedy is at least in sight.

463 F.2d at 734. Consequently, this Court concludes that the 1972 order was a "final order" and that "plaintiffs should not be permitted to reopen that judgment in order to obtain attorneys' fees." *Northcross, supra*, 611 F.2d at 635.

Plaintiffs' reliance on *Monroe v. Board of Commissioners of Jackson*, 581 F.2d 581 (6th Cir.1978) does not alter this Court's conclusion. There, the Sixth Circuit ordered $42,833 in fees to be paid under section 1988 for work done since the beginning of the litigation, even though a prior order in 1972 awarded $5,000 for costs incurred up to that point. *Monroe, supra*, at 582. This Court will not follow plaintiffs' reading of *Monroe* for two reasons. First, *Monroe* was a brief, *per curiam* opinion written in 1978. Its impact is reduced significantly by *Northcross*, which was written in 1979 and is regarded across the nation as

one of the most thorough and comprehensive opinions on the award of fees under section 1988. Insofar as a plausible reading of *Monroe* conflicts with the *Northcross* guidelines, this Court will view *Northcross* as taking precedence. Second, because this Court is bound by *Northcross,* the "final order" factor is important. In this regard, *Monroe* can be distinguished from the instant case because the 1972 order of the Sixth Circuit in *Monroe* which approved the $5,000 fee award was clearly not a "final order," whereas the instant case did have a "final order" entered (coincidentally, in 1972).[2]

Thus, plaintiffs are only entitled to fees incurred after May 30, 1972. Therefore, plaintiffs' request of fees will be reduced by 917.8 hours and 36.4 days for the work performed by Williams in the law firm of Looby and Williams, and 550.7 hours and 44 days for work performed solo by Williams between 1969 and May 30, 1972. The total amount disallowed here comes to 1,468.5 hours and 80.4 days.

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[2] Plaintiffs also cite *Monroe* to contest the Board's claim that the Sixth Circuit's failure to award plaintiffs' request for fees in 1972 is *res judicata* for purposes of this question. Because this Court's conclusion is based on the "final order" language of *Northcross,* it is not necessary to address the Board's *res judicata* analysis. The Court believes, however, that it would be inappropriate to give *res judicata* or collateral estoppel effect to the 1972 denial of fees. There, plaintiffs sought fees only for double costs incurred due to the Board's appeal of the 1971 plan, an appeal which plaintiffs described as "frivolous" for purposes of their fees request under Rule 38 of the Federal Rules of Appellate Procedure. Rule 38 allows the court to award double costs to the prevailing party when frivolous appeals are taken. In the instant request, plaintiffs seek to recover fees for the entire costs of the litigation, not just for costs incurred while prevailing on a frivolous appeal. Consequently, this Court would not be inclined to give the Sixth Circuit's *sub silentio* denial of fees under Rule 38 *res judicata* effect in this action.

C. *Fees for Appellate Work*

Plaintiffs have included in their request for fees amounts representing work performed at the appellate level. At the hearings on the fee issue, this Court ruled that it would not entertain requests for fees for appellate work, relying on *Buian v. Baughard,* 687 F.2d 859 (6th Cir.1982). There, the Sixth Circuit held that

> . . . a party must be entitled to receive costs on appeal as a result of the appellate court's award of costs before it is eligible to receive attorney's fees as a part of those costs under section 1988.

Id., at 861.

Plaintiffs have encouraged this Court to adopt a narrow reading of *Buian,* but, due to the lack of any limiting language in the opinion itself, this Court cannot adhere to plaintiffs' itnerpretation. In fact, the *Buian* opinion contains clear and broad statements which this Court will follow unless subsequently ordered otherwise. The Sixth Circuit in *Buian* stated:

> It is the duty of *this Court* to determine who is entitled to costs on appeal. In this case, in which no costs were taxed on the appeal on the merits, it would also violate this Court's mandate for the District Court to award attorney's fees as part of the costs under section 1988 because the party prevailed on the case as a whole but was not awarded costs on appeal.

Id. at 862. (emphasis added).

Buian went on to say:

> In summary, we read section 1988 as requiring that attorney's fees be awarded to the party who has prevailed on the case as a whole only if costs are awarded to that party at the level for which fees for services are sought: the

> district court, the court of appeals, and the Supreme Court.

Id.

This distinction between the district courts, the court of appeals, and the Supreme Court is jurisdictional in nature, according to *Buian:*

> Cost determinations are made at three levels: the district court, the court of appeals, and the Supreme Court. Each court has jurisdiction to make *de novo* awards of costs only for proceedings within its jurisdiction.

Id. at 861.

Thus, because section 1988 permits an award of attorney's fees "as a part of the costs," *Hutto v. Finney,* 437 U.S. 678, 679, 693-99, 98 S.Ct. 2565, 2568, 2574-78, 57 L.Ed.2d 522 (1978), this Court cannot, according to *Buian,* award fees for appellate work. Plaintiffs must petition the Court of Appeals, not the District Court, for appellate work. The Court notes that in its most recent decision, dated July 27, 1982, the Sixth Circuit ruled that each party was to bear its own costs on that appeal, which also precludes an award of fees for that appellate work. *Buian, supra,* at 861.

Consequently, plaintiffs' request will be reduced by the number of hours and days spent on appeals since May 30, 1972. This amounts to 115.8 hours and five days for Williams and 17.5 hours and two days for Dinkins. The request of Mr. Bill Lann Lee, who worked only on appeals, is denied in its entirety. As for Norman Chachkin, only 10 hours of his work was performed after May 30, 1972, and those hours were spent on an appellate brief. Thus, his request is denied in its entirety.

D. *Other Specific Objections*

Defendants have submitted several other objections to plaintiffs' fee requests which will be addressed herein.

Services Rendered by Mr. Looby

The School Board argues that because the estate of Z. Alexander Looby was closed on November 22, 1972, there is no entity or person remaining to receive compensation for services performed by Looby. Moreover, the Board states that plaintiffs did not submit a breakdown of what services Mr. Looby performed, and therefore, the hours representing work done by Mr. Looby and Mr. Williams should be reduced by one-half. The position of the School Board is well taken. However, the Court need not address this factor due to its earlier ruling that no fees can be awarded for services rendered prior to the May 30, 1972, final order, which includes the services performed jointly by Messrs. Looby and Williams.

"Collateral" Issues

Defendants also call into question time spent by plaintiffs' counsel on what defendants characterize as "collateral" issues. Specifically, defendants cite time allocated for matters involving intervening parties, amicus curiae, or third parties, and not the Board of Education.[3] Defendants argue that they are not responsible for the conduct of these parties, and time spent on those matters should be disallowed as part of plaintiffs' fee request as against the Board. Although the defendants did not exercise control over these particular facets of the litigation, the congressional intent behind the Act militates against adhering to defendant's approach. Congress has mandated that a prevailing party's attorney should be compensated by a fee-paying client, for all time reasonably expended on a matter." *Northcross,*

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[3] Defendant also challenges time spent regarding plaintiffs' request for an injunction against the Board of Education and the Tennessee Secondary School Athletic Association prohibiting the proposed suspension of Cameron High School from participating in organized sports. Proceedings on this matter were held in 1968, which means that the disputed time here has already been disallowed pursuant to the "final order" ruling as stated earlier in this opinion.

supra, at 636. A private sector attorney normally would be obligated to stay fully briefed on all aspects of his or her lawsuit, and no less should be expected of the plaintiffs' attorneys in this action. Thus, the hours spent on these matters shall be included in the award.

Fees for Time Spent with Consultants

Next, defendants question fees claimed for preparation with two consultants, Dr. Hugh Scott and HGH Associates. Defendants point out that HGH Associates proposed a desegregation plan which was never approved, either at the trial or appellate levels. However, it is not proper for this Court to dissect this lawsuit into "issues and parts of issues as to which plaintiffs did not prevail." *Northcross, supra,* at 636. The fees claimed for time spent with HGH Associates shall be allowed.

The question raised by defendants regarding Dr. Hugh Scott poses an altogether different concern. Defendants note that the hearings held by this Court in 1979 and 1980 involved lengthy testimony by Dr. Hugh Scott, plaintiffs' expert witness. Further, defendants point out that this Court's plan, as adopted in 1981, was based in a significant measure upon the testimony of Dr. Scott, only to have the plaintiffs subsequently alter their position. In essence, plaintiffs rejected the testimony of Dr. Scott in subsequent proceedings. As to this factual issue, the position taken by defendants is entirely correct. Plaintiffs selected this expert, put him on the witness stand, and knew what his testimony would be. Plaintiffs then made the decision to repudiate Dr. Scott's testimony, and that decision now acts to estop plaintiffs from seeking to recover attorney's fees against the defendant Board of Education for time spent by plaintiffs' counsel with Dr. Scott. The Sixth Circuit has held that

> [s]o long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.

Northcross, supra, at 636. Assuming that standard applies in this instance as well, plaintiffs' utilization and subsequent repudiation of Dr. Scott was frivolous, at best. Plaintiffs' request will be reduced only by the time clearly attributable to Dr. Scott. General requests regarding expert witnesses will not be eliminated since the Court cannot determine from the affidavits whether those requests pertain to Dr. Scott or other consultants. The amount deducted here amounts to two days and three hours for Mr. Williams and four hours for Mr. Dinkins.

"*Unreasonable and Excessive*" *Requests*

Defendants have sifted through the affidavits of plaintiffs' counsel and registered specific line-item objections to the amount of hours claimed for specific tasks performed. On a more general level, defendants seek an across-the-board percentage reduction for duplication of effort among defense counsel and the fact that the request for fees was based on reconstructed time records. On the latter topic, defendants argue that plaintiffs' local counsel have never kept daily time records, even though they submitted requests for fees as long ago as 1974. Defendants propose a twenty percent reduction for reconstruction, based on the figure utilized by the district court in *Heigler v. Gatter,* 463 F.Supp. 802 (E.D.Pa.1978). Further, defendants argue for a ten percent reduction due to duplication of effort among the several attorneys for the plaintiffs, citing *Weisenberger v. Huecker,* 593 F.2d 49, 54 (6th Cir.1979); *Oliver v. Kalamazoo Board of Education,* 576 F.2d 714, 715 n. 2 (6th Cir.1976).

Rather than pick out specific hours which appear to be duplicative or excessive, this Court has taken the "arbitrary but essentially fair" approach of deducting a small percentage of the total hours to eliminate duplication and padding, and to compensate for the use of reconstructed time records. *See Northcross, supra,* at 636-637. A ten percent reduction here ap-

pears reasonable.[4] Thus, plaintiffs' request shall be reduced by 54.5 hours and 3.83 days for Mr. Williams and 19.81 hours and 3.6 days for Mr. Dinkins.

E. *Reasonable Rates*

Northcross makes it clear that a fee based on the hours of service provided is the preferred approach to this request. 611 F.2d at 636. The level of compensation should represent the fair market value of the services provided, and despite defendants' arguments to the contrary, current hourly rates should be applied to plaintiffs' request, even for work performed some ten years ago. This method avoids the problem of taking proof to ascertain the fair market value of the services in prior years and, more importantly, takes inflation into account.

This Court has taken extensive proof regarding the prevailing rate charged by experienced and skillful trial lawyers in this region. From this proof, it appears that the prevailing market rate in federal court litigation for an attorney of Mr. Williams' experience and skill is $100 per hour for office work and $1,000 per trial day. A resonable rate in this community for Mr. Dinkins, who began working on this case upon gaining admission to the Bar five years ago, is $60 per hour and $600 per trial day.

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[4] A slightly higher percentage would be appropriate here, but for two factors. First, plaintiffs' counsel in their affidavits claim that their documented request did not include a significant amount of time spent on phone calls, and other conversations among counsel. This statement militates against defendants' request to apply a twenty percent reduction for reconstructed time as well as defendants' objections as to padding. Second, some, but not all, of the duplication here occurred between local counsel and those attorneys hired for appellate purposes. This Court has already ruled that it cannot entertain plaintiffs' request for appellate fees and consequently, that duplication cannot be considered here. Thus, a total reduction of ten percent appears to be an appropriate response to defendants' objections as to padding, duplication, and the use of reconstructed time records.

Plaintiffs request that a contingency factor of 100 percent be applied to these rates, due in part to the difficulty of this prolonged litigation and its unpopularity in some sectors of the community. An upward adjustment of some type is appropriate here. *See Northcross, supra,* at 638-39. However, the Court concludes that a contingency factor of 25 percent will serve the purpose of the Fees Award Act, i.e., to attract competent counsel by awarding adequate compensation. With this upward adjustment of 25 percent, the effective hourly rate will be $125 for Mr. Williams and $75 for Mr. Dinkins. The daily rate for trial time will be $1,250 and $750, respectively.

The compensation for Mr. Williams is based on the following calculations:

Mr. Williams (individually):

	1,221.5 hrs.	87.3 days (amount requested)
less	550.7 hrs.	44.0 days (pre May 30, 1972 work)
=	660.8 hrs.	43.3 days
less	115.8 hrs.	5.0 days (appellate work)
=	545.0 hrs.	38.3 days
less	3.0 hrs.	2.0 days (time spent with Dr. Scott)
=	542.0 hrs.	36.3 days
less	54.2 hrs.	3.63 (10% across the board reduction)
=	487.8 hrs.	32.67 days

487.8 hrs. × $125 ($100/hr. × .25 contingency) =	$ 60,975.00
32.67 days × $1,250 ($1,000/day × .25 contingency) =	40,837.50
Total =	$101,812.50

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[3] Defendants argue that no contingency factor should be applied because the defendants stipulated at the very beginning of this litigation that Nashville schools were unconstitutionally segregated. While this is true, this lawsuit has progressed through several distinct phases, and plaintiffs have, for the most part, continued to prevail, over and above the initial inquiry as to defendants' liability.

Mr. Dinkins:

	215.6 hrs.	38.0 days (amount requested)
less	17.5 hrs.	2.0 days (appellant work)
=	198.1 hrs.	36.0 days
less	4.0 hrs.	0.0 days (time spent with Dr. Scott)
=	194.1 hrs.	36.0 days
less	19.41	3.60 (10% across the board reduction)
=	174.69 hrs.	32.4 days

174.69 hrs. × $75 ($60/hr. × .25 contingency) = $ 13,101.75
32.4 days × $750 ($600/day × .25 contingency) = 24,300.00
Total = $ 37,401.75

Mr. Williams shall be awarded $101,812.50 and Mr. Dinkins shall receive $37,401.75.

IV. *Costs*

Plaintiffs also seek to recover certain costs pursuant to Rule 54(d), Fed.R.Civ.P., and Rule 13 of the Local Rules of Court.

Included in plaintiffs' request are costs involved with plaintiffs' appeal of this Court's 1981 decision to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed this Court's opinion in part, reversed in part, and remanded for further proceedings. That order, dated July 27, 1982, also stated that each party was to bear its own costs in the appeal. Order dated July 27, 1982, No. 81-5370. Thus, plaintiffs' request for costs incurred on that appeal has already been denied, and cannot be granted by this Court. This eliminates all of the costs incurred by Mr. Lee, and those expenses incurred by Mr. Williams after April 17, 1981, the date of this Court's order.

Plaintiffs' Bill of Costs also contains items which traditionally are not taxable as costs under Rule 54(d). These include expenditures for postage, telephone calls, photocopying, and meals. See 10 Wright, Miller & Kane, *Federal Practice and Procedure:* Civil 2d § 2677 at 370-373 (1983). Certain of the expenditures are taxable, however, under section 1988. The Sixth Circuit in *Northcross* held that

> [t]he authority granted in section 1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of § 1988.

611 F.2d at 639.

Thus, plaintiffs are entitled to recover costs incurred for postage, telephone calls, parking, photocopying, and air freight, as long as those costs were incurred prior to April 17, 1981, the date of this Court's order. As stated earlier, plaintiffs were ordered to bear their own costs on the appeal. The amount taxed as costs here amounts to $361.28, based on the affidavit of Mr. Williams. Meal expenses incurred by Mr. Williams are disallowed, as are the undocumented expenses of Mr. Dinkins, listed in the amount of $144.87.

Turning now to costs relating to expert witnesses, fees paid to Dr. Scott and HGH Associates to retain their consulting services are not to be taxed against defendants. Normally, Dr. Scott's expenditures for travel, subsistence, and overnight accommodations would be taxable pursuant to 28 U.S.C. § 1821. However, "the award of statutory costs is a matter for the district court, in its best judgment as to what was reasonable and necessary." *Northcross, supra,* at 640. For the reasons stated earlier regarding the recovery of attorney's fees for time spent with Dr. Scott, expenses incurred by Dr. Scott are also disallowed. The Court finds that it would be unreasonable to tax Dr. Scott's expenses against defendants. Plaintiffs will not be heard at this juncture to claim that Dr. Scott's testimony was "relevant and material" or "reasonably necessary" to support the position taken by the plaintiffs in this litigation. *See 6 Moore's Federal Practice* ¶ 54.77[5.-1] (2d ed. 1982) and cases cited therein.

In all other respects, plaintiffs' request for costs shall be denied. Costs in the amount of $361.28 shall be taxed against defendants.

V. *Contempt*

The remaining issue to be resolved at this time is plaintiffs' petition for contempt, filed December 27, 1976, and amended August 28, 1978. The gravamen of the petition is that defendants have intentionally engaged in a course of conduct which violated this Court's prior order entered in 1971. The 1971 order enjoined the use of portable classrooms for any purpose other than integration. It also enjoined the Board from renovating or enlarging by either construction or use of portables any schools that served less than fifteen percent black students after implementation of the plan.

Plaintiffs allege that the Board violated the order by using portables to implement a kindergarten program, by using the vacated Turner Elementary School as an annex for Cole Elementary, by expanding Hillsboro, Glencliff, Hillwood, Maplewood, Overton, and Stratford High Schools, and by proposing to build a Goodlettsville-Madison Comprehensive High School.

The Board contends that none of the acts alleged to be violations of the 1971 order actually constituted proscribed activity under the restrictions imposed by the Court. Moreover, the Board states that it diligently notified the Court and counsel for plaintiffs regarding any changes in the school system, even when the Board's attorney found that the changes were not of the type requiring prior judicial approval.

Regarding the use of portables at the kindergarten level, the Board argues that the 1971 order never addressed kindergarten, and that the HEW plan did not include them. The Board relies on proof presented at hearings in 1979, where a Board official testified that new portables had been placed only at schools hav-

ing fifteen percent black students under the plan as implemented, or in elementary schools to permit the opening of kindergartens. Finally, the Board points out that it petitioned this Court on May 30, 1973, for explicit approval of the plan to use portables in this manner. This petition was never acted upon.

The Board also notified the Court concerning its plans to use Turner as an annex for Cole Elementary School, although the notification did not take the form of a formal pleading. In implementing this change, the Board claims that it relied on the precedent of a 1972 ruling by this Court approving the use of an annex at Mt. View Elementary School to relieve overcrowding at Lakeview Elementary School, and on the fact that other similar changes had been adopted without any expressed dissent from the Court or counsel for plaintiffs. The Board also claims that the 1971 order was silent as to the use of closed, existing buildings to relieve over-crowding.

Turning now to the Board's decision to expand certain high schools, the Board filed its original proposal with the Court on May 30, 1973. For the next two or three years, the Board claims to have notified the court of revisions in its plan for area high schools. Eventually, the Board implemented some of the proposals under the belief that the schools affected did not come under the 1971 order because they would continue to maintain a black population of fifteen percent or more. Plaintiffs' other allegation concerning the proposed Goodlettsville-Madison Comprehensive High School is not well founded in that the school was never built. As discussed in this Court's 1980 Memorandum and Order,[6] the 1971 Court order specifically enjoined the construction of the Goodlettsville-Madison High School as proposed because it was to be located within the city limits of Goodlettsville, a location which would have promoted

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[6] *See Kelley, supra,* 492 F.Supp. at 174.

segregation. The subsequent proposal, although never implemented, called for the school to be built nearer to the imaginary line of Briley Parkway extended, thereby arguably conforming with this Court's directive. According to Board officials, the school, under this revised plan, had a projected black enrollment of greater than twenty percent.

Finally, plaintiffs contend that the Board's action in closing certain schools or changing the grade levels accommodated by particular schools somehow violate the 1971 order. Plaintiffs contend that these decisions demonstrate a discriminatory motivation on the part of the Board. The Board has responded by setting forth its objective reasons for making changes in schools located in predominantly white as well as predominantly black neighborhoods, and argues these actions in no way contravened the letter or the spirit of the 1971 order.

From the preceding recitation of the facts and positions asserted by the parties, this Court concludes that the contempt charges against the defendants should be dismissed. This Court finds that the Board, in the years following the 1971 order, acted in good faith in its efforts to comply with that order while going about the task of operating a school system. There is no proof that the Board's actions were a subterfuge to undermine the 1971 order. Furthermore, there is no evidence that the decisions of the Board were part of an effort to block the desegregation of the Metropolitan Nashville city schools. This court has consistently found that the Board has acted in good faith in implementing the 1971 order. Plaintiffs claim in this motion for contempt that his Court had previously found that the schools became resegregated due to the Board's efforts to accommodate white flight into the suburbs. This contention is totally incorrect. During the December 1982 hearings this Court explained its position on this question, stating that the resegregation resulted not from actions taken by the Board, but rather, from the 1971 plan itself which did not include the outer-reaches of Davidson County. Even after this explanation, plaintiffs con-

tinue to press forward with their inaccurate interpretation of this Court's opinion. It is time to lay that false allegation to rest once and for all.

As stated by the Supreme Court and repeated by the Sixth Circuit, "the judicial power of contempt is a potent weapon." *Reed v. Cleveland Board of Education*, 607 F.2d 749, 752 (6th Cir.1979), quoting from *ILA, Local 1291 v. Philadelphia Marine Trade Association*, 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967). Such a potent weapon should be used only where the evidence of contempt is clear and convincing. That is not the case here. The Board acted only where, upon the advice of counsel, it felt the 1971 order provided some latitude, and diligently notified the Court and plaintiffs about proposed changes, although little guidance from this Court was forthcoming once the 1971 order was entered. To find the Board in contempt, it would be necessary to read more into the 1971 order than was stated in its clear and express terms, and that type of approach to a contempt charge is impermissible. *Reed, supra*, at 752 ("[t]he notice of a judicial order upon violation of which a contempt finding may properly be based is such notice as would clearly tell a reasonable person what he is required to do or abstain from doing").[7]

The facts in this case, as presented to this Court, simply do not warrant a finding that the Board's actions placed it in contempt.

An appropriate order shall enter.

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[7] Additionally, *Reed* states that "defendants were required to obey the District Judge's orders, but they were not required to obey the interpretations of the District Judge's orders made by plaintiffs." 607 F.2d at 752.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

Nos. 2094, 2956

Robert W. Kelley, et al.,
Plaintiffs,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.
Defendants.

ORDER
(Filed February 23, 1983)

In accordance with the accompanying Memorandum, it is hereby ORDERED that plaintiffs are awarded attorney's fees pursuant to 42 U.S.C. § 1988 in the amount of $139,214.25; costs of $361.28 are taxed against defendants; and plaintiffs' petition for contempt is denied.

_____
United States District Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos: 83-5175, 5243

Robert W. Kelley, et al.,
Plaintiffs/Appellants/Cross-Appellees,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.
Defendants/Third Party Plaintiffs/
Appellees/Cross-Appellants.

PETITION FOR REHEARING AND FOR REHEARING EN BANC

The appellees and cross-appellants, Metropolitan County Board of Education, et al. (hereinafter Metro), hereby petition the Court for a rehearing of the case resulting in the opinion of the Court *en banc* on September 23, 1985. Further, Metro requests a rehearing *en banc.*

Metro's counsel believe, based upon their reasoned and studied professional judgment, that the Court's decision concerning the finality of the 1971 desegregation plan is contrary not only to *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), but also to the panel's decision in *this case* August 19, 1981, granting a stay of a District Court order, *Kelley v. Metropolitan County Board of Education,* No. 81-5370 (6th Cir. August 19, 1981) (attached hereto as Exhibit A). Further, consideration by the full Court, in light of the previous *en banc* determination, is necessary to maintain uniformity with the decisions of this Court in *this case.*

STATEMENT OF THE CASE

This is the attorneys' fees aspect of a desegregation case which began in 1955. In 1971, the District Court ordered the implementation of a comprehensive desegregation remedy utilizing extensive cross-town bussing wherever it was practical to use this mechanism in the 500 square mile county which constituted the school system. *Kelley v. Metropolitan County Board of Education,* Memorandum Opinion, June 28, 1971, App. 140. The District Court's order was entered pursuant to *Swann v. Charlotte-Mecklenburg,* 402 U.S. 1 (1971), and the new desegregation plan was affirmed by this Court. *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir. 1972).

In 1979, the District Court held that this 1971 plan, well intentioned though it was, and grounded in the circumstances as they then existed, had the effect of fostering resegregation over the years, despite the good faith efforts of Metro in implementing the plan.[1] Based upon this finding, consideration of a new desegregation plan was ordered, which the District Court approved and ordered implemented on April 17, 1981. *Kelley v. Metropolitan County Board of Education,* 511 F.Supp. 1363 (M.D. Tenn. 1981).

Just a few days before school was to open on August 21, 1981 for the fall semester, the plaintiffs applied to this Court for a stay of the District Court's order. A large part of the plaintiffs' rationale for the stay of the new order was that the 1971 plan was a plan approved by this Court and the District Court pur-

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[1] As the District Court said: "The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the school board in the implementation of the Court's order amounts to a *de jure* segregation." *Kelley v. Metropolitan County Board of Education,* 479 F.Supp. 120, 122-23 (M.D. Tenn. 1979). *See also Kelley v. Metropolitan County Board of Education,* 492 F.Supp. 167, 170-71, n. 10-11, 175-76 (M.D. Tenn. 1980).

suant to *Swann,* and that it was entitled to a "presumptive validity." (Plaintiffs' Application for Stay, attached hereto as Exhibit B, pp. 12-13.)

Just two days before school was to begin in Nashville, this Court, through its panel, stayed implementation of the District Court's new plan with the following language:

> In concluding...that where (as here) after many years a final school desegregation order has been entered in the District Court, appealed to this Court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought.

Kelley v. Metropolitan County Board of Education, No. 81-5370 (6th Cir. August 19, 1981) (Exhibit A) (Emphasis supplied).

ARGUMENT FOR REHEARING AND FOR REHEARING EN BANC

Metro respectfully asserts that this Court, in its stay order of August 19, 1981, addressing the substantive issues in this case, recognized the 1971 desegregation plan for what it was—*a final order* requiring implementation of a comprehensive desegregation plan in Nashville, Tennessee, pursuant to the existing case law. Accordingly, this Court declined to permit deviations from the *final* desegregation plan until the case could be heard fully on its merits. The stay opinion recognized implicitly that unless changes in the law or circumstances regarding the parties had occurred since 1972, the comprehensive plan approved by this Court in 1972 on appeal could not be modified.[2]

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[2] As this Court earlier recognized, if the plaintiffs or defendants found adverse effects from or changed circumstances after implemen-

Metro respectfully submits that the 1971 court order, affirmed by this Court in 1972, should be treated no differently during the attorneys' fees portion of this case than it was during the substantive portion. The 1971 plan, affirmed by this Court was *a final order* which a panel of this Court in 1981 viewed as a discrete step in the litigation. Indeed, deviations therefrom could not be permitted without prior appellate review, even when a failure to permit such deviations resulted in a significant delay in the opening of schools.

Thus, in addition to the District Court's factual findings concerning finality of the 1971 desegregation plan which were not held by this Court in its recent opinion to be clearly erroneous, a panel of this Court in 1981 also recognized that the 1971 plan represented a clear break in the proceedings. The inconsistency now apparent on the record should be resolved, and Metro respectfully submits that a rehearing and reconsideration *en banc* should be granted.

Respectfully submitted,

WILLIS & KNIGHT

By: /s/ William R. Willis, Jr.

By: /s/ Marian F. Harrison

215 Second Avenue North
Nashville, Tennessee 37201

Attorneys for Appellees/
Cross-Appellants

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tation of the 1971 plan, these problems could be addressed at the District Court level, under the general notion that all decrees in equity are susceptible to modification based upon changes in the law or facts. *Kelley v. Metropolitan County Board of Education,* 463 F.2d 732, 745-46 (6th Cir. 1972).

EXHIBIT A

Office of the Clerk
United States Court of Appeals
For The Sixth Circuit
Cincinnati, Ohio 45202

August 19, 1981

Mr. Avon N. Williams, Jr.
Mr. Jack Greenberg
Mr. William R. Willis, Jr.

Re: Our Case No. 81-5370
Robert W. Kelley, et al; Henry C. Maxwell, Jr., et al, Plaintiffs-Appellants, vs. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, Defendants-Appellees.
Dist. Ct. No. 2094 & 2956

Dear Counsel:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,

John P. Hehman, Clerk

By: /s/ Suzanne W. Hogan
Deputy Clerk

Enclosure
Cert. copy: Ms. Julia B. Cross, Clerk
Hon. Thomas H. Wiseman, Jr.

No. 81-5370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert W. Kelley, et al.; Henry C. Maxwell, Jr., et al.,
Plaintiffs-Appellants,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee,
Defendants-Appellees.

ORDER

Before: EDWARDS, Chief Circuit Judge, JONES, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

On receipt and consideration of a motion for stay filed by Robert W. Kelley, et al., plaintiffs-appellants; and

On consideration of said motion under terms of Rule 8 of the Rules of Appellate Procedure and pertinent case law, *Virginia Petroleum Job. Ass'n v. Federal Power Com'n,* 259 F.2d 921, 925 (D.C. Cir. 1958); *see also North Avondale Neighborhood Ass'n v. Cincinnati Metropolitan Housing Authority,* 464 F.2d 486, 488 (6th Cir. 1972); and

Further noting that generally four factors are required for the issuance of a stay, as follows:

1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?

2. Has the petitioner shown that without such relief, it will be irreparably injured?

3. Would the issuance of a stay substantially harm other parties interested in the proceedings?

4. Where lies the public interest?

Observing from this record that affirmative answers favorable to plaintiffs' motion must be given in relation to the first two of these questions, while a negative answer appears appropriate to the third;

And concluding as to the fourth question that where (as here) after many years a final school desegregation order has been entered in the District Court, appealed to this court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought;

Now, therefore, plaintiffs' motion for stay is hereby granted, the mandate is ordered issued forthwith, and the appeal is expedited for hearing in the October term of this court.

Entered by order of the Court

/s/ John P. Hehman
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
U.S. Post Office & Courthouse Building
Cincinnati, Ohio 45202

October 15, 1985

Mr. J. Michael Cody
Mr. Charles Ralston
Mr. Avon N. Williams, Jr.
Mr. William R. Willis, Jr.

Re: Case Nos. 83-5175/5243
Robert W. Kelley, et al. vs. Metropolitan County Board of Education of Nashville, et al.

Dear Counsel:

Enclosed with this letter are the copies of the petition to rehear and for rehearing in banc which you submitted last week. These are being returned to you at the direction of the Court, inasmuch as neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circiut provide for the filing of a petition to rehear a case which has already been reheard.

Accordingly, the filing of the second petition has been withdrawn and the docket of the Court so reflects. The mandate of the Court will issue in due course.

Very truly yours,

/s/ Leonard Green
Chief Deputy Clerk

LG/jj
Enclosures

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-5175/5243

Robert W. Kelley, et al.,
Plaintiff-Appellants,

vs.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.
Defendants-Appellees/Cross-Appellants.

ORDER STAYING MANDATE
(Filed October 25, 1985)

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action No. 3931

Deborah A. Northcross, et al.,
Plaintiffs,

vs.

Board of Education of the Memphis City Schools, et al.,
Defendants.

ORDER
(Filed July 29, 1966)

This cause came on to be heard on the report to the Court and motion of defendants for an order approving the modified plan of desegregation; and

It appearing to the Court from the statement of counsel that plaintiffs have not had sufficient time to study the proposed modified plan of desegregation, nor have plaintiffs had an opportunity to obtain an opinion from Jack Greenberg, Esq., one of plaintiffs' associate counsel, so that plaintiffs request an additional three (3) weeks within which to study the plan; and

It further appearing to the Court from statement of counsel that within three (3) weeks the parties will advise the Court whether or not plaintiffs agree or object to the modified plan of desegregation, and in the event that plaintiffs do not approve the plan, request will be made for a hearing on their objections.

And it further appearing to the Court that the parties agree that the defendants may put such parts of the modified plan into effect as are possible for the coming school year, except that plaintiffs expressly waive the requirement for the filing of the

report due on August 15, 1966, as provided for in sub-paragraph 2 of paragraph IX of the modified plan.

IT IS THERFFORE, ORDERED, ADJUDGED AND DECREED, that on or before August 19, 1966, the parties report to the Court as to whether the plaintiffs approve the modified plan of desegregation heretofore filed in the cause by defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendants may put such parts of the modified plan of desegregation into effect as are possible for the school year commencing July 1, 1966.

/s/ Marion D. Bond
Judge

Approved:

/s/ A. W. Willis, Esq.
For Plaintiffs

Evans, Petree, Cobb & Edwards
By _____
For Defendants

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C.A. No. 3931

Deborah A. Northcross, et al.,
Plaintiffs,

vs.

Board of Education of the
Memphis City Schools, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO FEES AND COSTS

This school desegregation case is before the Court on remand from the United States Court of Appeals for the Sixth Circuit for "a complete recalculation" of certain attorneys fees and litigation expenses due under 42 U.S.C. §1988. *Northcross v. Board of Educ. of the Memphis City Schools*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

The opinion of the Court of Appeals dealt with consolidated appeals from two judgments entered by this Court on two separate applications of the plaintiffs for awards of costs, expenses, and attorneys fees. The first judgment dealt with plaintiffs' application for compensation for services and expenditures from the commencement of this suit in 1960 through 1976. With respect to this judgment, the Court of Appeals remanded the case to this Court "for any necessary evidentiary proceedings, a resolution of the legal issue concerning the finality of the 1966 ruling, and a recalculation of attorneys fees due to the plaintiffs for services rendered to them until the final desegregation order was entered in 1974." *Id.* at 643.

The second judgment before the Court of Appeals disposed of plaintiffs' application with respect to services and expenditures in connection with a hearing in this Court in May 1977 necessitated by a Board of Education request to modify the final plan of desegregation (Plan Z) in various ways. As to this judgment, the Court of Appeals reviewed the record and made its own determination of reasonable fees and costs to be awarded. Thus, with respect to that judgment, the Court of Appeals "remanded with instructions to the district court to enter judgment for plaintiffs in the amount of $22,604.02 to compensate them for services rendered by their attorneys and expenses incurred in 1977." *Id.* at 643. On 3 October 1980 this Court entered an order directing the Board to pay the amount set by the Court of Appeals, plus interest, for a total award on this part of the case of $25,605.51. This order also directed the Board to pay plaintiffs $4,020.55 in appellate costs as per the mandates issued by the Court of Appeals.

Following the Supreme Court's denial of certiorari, this Court held several conferences with counsel for the parties, the parties have submitted supplemental affidavits, stipulations and documentation, proposed findings and conclusions, and the Court has conducted a hearing. While these proceedings were going on, plaintiffs and the City of Memphis settled their dispute for $20,000, as reflected by the consent order approved and entered by the Court on 1 December 1980.

This opinion incorporates findings of fact and conclusions of law with respect to all services rendered by plaintiffs' counsel and expenditures incurred from the commencement of this litigation in 1960 until the date of this opinion, exclusive of those aspects of the fee/cost dispute described above, which have been resolved.

In the remand opinion the Court of Appeals explained that fee awards in civil rights cases may no longer be determined on the basis of the appropriate statute in this case, the Civil Rights

Attorneys Fees Awards Act of 1976 (42 U.S.C. §1988). Now "the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees." *Id.* at 632. The Court of Appeals indicated that it found from the legislative history of the statute that Congress expressly commands the courts to use the broadest and most effective remedies available to them to achieve the goals of the civil rights laws. *Id.* at 633. The examples which the Court of Appeals gave to explain the "broadest and most effective remedies which Congress intended" and the many holdings which sometimes sternly and critically found that this Court had abused the "discretion" referred to in the statute wherein it provides: "the court, in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs," indicate that this Court far too narrowly interpreted the law. In these findings and conclusions this Court will undertake to award fees commensurate with the command of the Court of Appeals as set forth in the remand opinion.[1]

Since 1968 the plaintiffs have been represented by the Memphis law firm of Ratner & Sugarmon and its predecessor partnerships. Four of the firm's lawyers at various times have provided representation to plaintiffs: Louis R. Lucas, an initial partner in the firm; William E. Caldwell, a partner in the firm since spring 1974 and an associate prior to that time; Elijah Noel, Jr., a former associate in the firm; and Richard B. Fields, an associate in the firm. Prior to 1968 the plaintiffs were represented primarily by A. W. Willis and R. B. Sugarmon, Jr., who became initial partners in the firm when it was formed in 1967.

From the commencement of the litigation in 1960 until the present time, the representation of plaintiffs has been assisted,

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[1] It is here noted that the relative positions of the parties are typical of their positions on all of the major issues in this much litigated case — opposite extremes.

both with financial support and professional services, by the NAACP Legal Defense and Educational Fund, Inc. (Legal Defense Fund). The Legal Defense Fund is a non-profit corporation chartered by the New York Court of Appeals and authorized to serve as a legal aid society, one of its purposes being to render legal assistance gratuitously to "colored persons" suffering injustice by reason of race or color who are unable on account of poverty to employ and engage legal aid in their own behalf. The Legal Defense Fund does not charge individuals whom it represents for its services. Affidavit of Norman J. Chachkin ¶6 (filed 21 September 1976). The Legal Defense Fund has paid most of the litigation expenses incurred by plaintiffs in this litigation. In addition, the Legal Defense Fund has periodically paid to the firm a relatively small per diem allowance for professional services for the purpose of helping defray the overhead expenses as a result of its participation in the case. Throughout the 20-year history of the litigation the firm has received about $27,000 in such per diem allowances. Second Supplemental Affidavit of Norman J. Chachkin, ¶4 (filed 8 November 1976); Supplemental Affidavit of William E. Caldwell, ¶3 (filed 4 October 1976). Fees recovered by the Legal Defense Fund for the services of its staff attorneys in litigation are utilized in furtherance of the organization's civil rights litigation and its other purposes. Supplemental Affidavit of Norman J. Chachkin, ¶6 (filed 4 October 1976).

The bulk of the services rendered by the Legal Defense Fund since 1968 were provided by Norman J. Chachkin and, more recently, by Bill Lann Lee. Prior to 1968 most of the Legal Defense Fund services were provided, first, by Constance Baker Motley, now a United States District Judge for the Southern District of New York, under the supervision of Legal Defense Fund director-counsel Thurgood Marshall, now an Associate Justice of the Supreme Court; and later by Derrick A. Bell, now a professor of law at Harvard Law School. In their initial submission on fee amounts of 4 October 1976 the plaintiffs requested an award for services rendered by the Legal Defense

Fund while Judge Motley and Justice Marshall were associated with the organization. On 5 October 1976, however, plaintiffs withdrew their request with respect to these services — estimated at 210.8 hours — "[i]n order to avoid any possibility of the appearance of impropriety or public misunderstanding" even though any fees recovered for these services would have gone to the Legal Defense Fund, not to the individuals.

Entitlement to Fees for Pre-1968 Services

The first issue this Court will address under the Court of Appeals' mandate is whether or not plaintiffs are entitled to recover attorneys fees for services rendered prior to 1968. With respect to the post-1968 period, the Court of Appeals directed: "The fee awarded should cover at least the period back to 1968 when the suit became active again following the Supreme Court's *Green* decision." 611 F.2d at 635. The Court then described the issue which this Court is now required to resolve (*id.*):

> There is an unresolved dispute concerning the pre-1968 period which we leave to the district court to resolve. The School Board contended below that the district court action of July 29, 1966, the last action before the Supreme Court's *Green* decision, was a "consent order" which undertook to dispose of all outstanding phases of the case, including fees and costs. It is true that a long, complicated case of this sort can result in several "final" orders, which in the interest of finality are deemed to dispose of all foregoing issues. Absent a timely appeal, a party is bound by the order and any later challenge is deemed to be a collateral attack judged by different, and more stringent standards than on direct review. *Bradley, supra,* 416 U.S. at 710-11, 95 S.Ct. 2006. If the defendants are correct in their characterization of the 1966 action in the interest of finality, plaintiffs should not be permitted to reopen that judgment in order to obtain attorneys' fees. We leave this matter to the district court.

The Court finds that the services expended on the portion of the case occurring prior to the filing on 26 July 1968 of plaintiff's motion for further relief should be denied. A plan of desegregation in this cause conforming to what was thought to be the then existing legal standards, was developed and filed jointly by the parties on 22 July 1966. That plan was intended and treated by the parties as a final plan of desegregation, and a distinct break in the proceedings in this case occured at that time. Previous to that time there had been two appeals taken successfully by the plaintiffs. The 1968 motion for further relief did not grow out of any evident intention of these parties to litigate that plan further, but was the direct result of subsequent Supreme Court decisions in the case of *Green v. County School Board of New Kenty County, Virginia,* 391 U.S. 430 (1968), and its companion cases which represented very significant new development in the law pertaining to school desegregation. The case at bar is similar to the case of *Wheeler v. Durham City Board of Education,* 585 F.2d 618 (4th Cir. 1978), wherein the Court held that plaintiffs might timely file for a fee resulting from the continuous hearings and appeals on their motion for further relief, but denied a fee for earlier "discrete steps" in the litigation.

Calculation of a Reasonable Fee

The Court of Appeals summarized the approach required to arrive at a reasonable attorneys fee as follows: (*id.* at 642):

> We conclude that an analytical approach, grounded in the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the "time and labor involved," "the novelty and difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service

> properly," "the customary fee," and the "experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations and the "undesirability" of the case.

The Court of Appeals has thus required a three-pronged approach which requires this Court to determine (1) the number of hours of services performed by plaintiffs' attorneys, (2) the "normal hourly billing rate" applicable for each attorney, and (3) whether upward adjustments should be made and the amount thereof.

Hours of Service Provided

The Court of Appeals made it clear that plaintiffs' attorneys are entitled to compensation for all the time reasonably expended on this case because the plaintiffs prevailed in the case as a whole. The Court said (*id.* at 636):

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith . . . . The fact that these lawyers advocated a desegregation remedy of broader scope and faster pace than was ultimately adopted cannot be considered to be unreasonable. Their clients have prevailed; the Memphis school system is desegregated.

The Court further stated on page 636:

> We conclude that a fee calculated in terms of hours of service provided is the fairest and most manageable approach. The district court should indicate on the record the number of hours it finds the plaintiffs' attorneys have expended on the case. This finding must first take into account the affidavits of counsel. The hours claimed need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action, so that we may determine whether the court properly exercised its discretion or made an error of law in its conclusion. Hours may be cut for duplication, padding or frivolous claims. In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services.

This Court has never found, and does not find, that any of the positions asserted by plaintiffs were made in bad faith or were frivolous. Accordingly, plaintiffs are entitled to compensation for all claimed hours which were actually spent on the case except an "arbitrary" adjustment for duplication and other reasons set forth below. The various affidavits of plaintiffs' counsel claim a total of 5,213.5 hours of services. The services of plaintiffs' counsel, as well as litigation expenses and counsels' backgrounds and experiences, are set forth in 18 affidavits of counsel. The Court will analyze these services with respect to each phase of this case in greater detail below. Plaintiffs' attorneys did not maintain detailed contemporaneous time records prior to 1974 (Stipulation of Counsel, ¶3, filed 18 Nov. 1980).

They have reconstructed the services rendered for that period from billings submitted to the Legal Defense Fund for per diem allowances, from partial calendar records, and from the file in

the case. The reconstruction process is described in Caldwell Aff. ¶6, Supp. Caldwell Aff. ¶3, 2d Supp. Caldwell Aff. ¶2, Lucas Aff. ¶5, Chachkin Aff. ¶3, and Stipulation of Counsel ¶2 (filed 18 Nov. 1980).

It is the opinion of this Court that the directions of the Court of Appeals intended for this Court to accept these calculations in spite of their faults. Therefore, the Court finds that the hours claimed on the affidavits are allowed as a basis for the fees except to the extent that they are expressly disallowed in these findings.[2]

The Court disallows 12.55 hours from the total shown on the affidavit of Elijah Noel dated September 20, 1976, on the basis that there is an error in addition.

Since the remand of this case, further affidavits have been submitted including the affidavit of Richard B. Fields dated August 5, 1980, seeking an award for services in monitoring the Court Order and in negotiating modifications to Plan Z since June 1977. The Court of Appeals has held that monitoring services are allowable, and Mr. Fields is seeking an award based on a total of 127.6 hours. The bulk of these hours is allowable with the exception of some items which fall outside the scope of this lawsuit. Those items include such matters as attendance at an Urban League Symposium and lunch with representatives of such community organizations as MIFA and the news media are not sufficiently connected to the litigation of this case to warrant compensation. Those items are numbers 61, 65, 66, and 76 on the attachment to the affidavit and they total 12 hours, leaving a total of 115.6 allowable hours.

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[2] While plaintiffs' lawyers have utilized considerable law-student and paralegal assistance during various phases of the litigation, they make no request that those services be compensated (because of the inadequacy of records reflecting those services). Caldwell Aff. ¶9.

In determining the net allowable hours, the Court is also called on to determine whether reductions should be made based upon duplication of hours and/or over-estimates as to the number of hours spent. It has been fairly settled in this Circuit that, where duplication appears, the Court is entitled to make an across-the-board "arbitrary" adjustment based on an estimated percentage of duplication, rather than attempting to eliminate specific hours on an itemized basis. This approach was approved in *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714 (6th Cir. 1978), and used by the Court of Appeals in reaching a final award of attorneys fees for the 1977 hearing in the appeal of this case. Similarly, a 10% reduction in total hours based on duplication alone was used by the Court of Appeals in *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979). In the present case substantial duplication of effort appears not only from the number of counsel appearing on briefs and appearing at particular trials of this cause, but from the fee affidavits themselves, which reflect extensive consultation and conferences among co-counsel and which show that the receipt of documents, pleadings, and orders usually occasioned the expenditure of a good deal more time than was necessary to review the documents. This time was obviously occasioned by the multiplicity of counsel in the case and by the fact that the case was handled throughout on the basis of continuing communications between trial counsel and Legal Defense Fund counsel in New York. Even at appellate arguments in the case, co-counsel would frequently appear, as exemplified by the ninth item on Mr. Caldwell's original affidavit of September 20, 1976. This item claims 16 hours for Caldwell based upon the argument of Louis Lucas in the 6th Circuit Court of Appeals. Based on the record and on this Judge's familiarity with the proceedings in this case, the Court finds that a Court of Appeals maximum of 10% reduction in otherwise allowable hours should be granted as the means of accounting for these duplicative services, except for the portion of the case pertaining to fee litigation.

Reasonable Hourly Rates

The guiding standard laid down by the Court of Appeals for determining the reasonable hourly rates of compensation for each of the Attorneys for the plaintiffs in this cause — the second part of the mandated "analytical approach" — is the "fair market value of the services provided." The Court elaborated as follows (*id.* at 638):

> We have indicated in several opinions that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service being provided. Again turning to our mandate to award fees "as is traditional with attorneys compensated by a fee-paying client," a scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to §1988. The use of broad categories, differentiating between paralegal services, in-office services by experienced attorneys and trial service, would result in a fair and equitable fee.
>
> In determining what the level of compensation for each category of service should be, the court should look to the fair market value of the services provided. In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney. For those attorneys who have no private practice, the rates customarily charged in the community for similar services can be looked to for guidance.

The Court of Appeals illustrated this method of arriving at normal hourly rates in its disposition with respect to the 1978 fee award. There the Court applied a "bifurcated scale" in determining the normal hourly rate for plaintiffs' counsel Lucas. In calculating the fee for Lucas the Court used "as base figures $125 per hour for trial work and the $75 per hour which the district court found to be reasonable for office services." *Id.* at

641. With respect to the services of plaintiffs' counsel Noel and Fields, the Court of Appeals accepted this Court's across-the-board base fee of $60 per hour for Noel and $40 per hour for Fields. *Id.*

In its previous decision of November 4, 1977, this Court set the base fee rate for services rendered between mid-1971 and 1974 at $60 per hour for Lucas and $40 per hour for Caldwell during the earlier parts of that time frame, and $60 per hour for Caldwell during the later proceedings. Neither the plaintiffs in their appeal nor the Board in its cross-appeal challenged these rates, and the Court of Appeals "express[ed] opinion as to the accuracy of the fee per hour awarded in the 1977 award . . . " *Id.* at 641. The record herein persuasively demonstrates that the rates previously established by this Court for the 1971-74 period are reasonable reflections of the fair market value at the time of the services provided by Caldwell and Lucas.

Inflation Factor

The question remains whether the base fee rates applicable for earlier time periods should be adjusted to account for the greatly diminished purchasing power of such early-year dollars in light of the intervening years of inflation. This Court is required to resolve this issue by the following directive of the Court of Appeals: "Among other factors, the district court will be required to consider whether the inflation of the intervening years must be taken into account, or whether the lower rate which prevailed for services at the time they were rendered has been balanced by the long delay which will reduce the purchasing power of the award's dollars in the present marketplace." *Id.* at 640. The inflation problem can be resolved either by applying an inflation factor to the normal hourly rates into line with 1980 dollars, or, alternatively, by applying recent hourly rates to the services rendered in the earlier years.

The attorneys for the plaintiffs advocate and claim that inflation should be compensated for by paying 1981 hourly rates for

all hours devoted to the case. This means that Louis Lucas would be paid $125 per hour for services rendered in 1971, a period in which this Court found and plaintiffs concede an hourly rate for his services to be $60. As experience and the record reflect, the value of the hourly rate has increased for attorneys based upon the inflationary trend and the increased value of the services of the attorney due to experience. Therefore, the use of current or recent rates appears to be a plausible method of adjusting for inflation even though it is arbitrary for some times.

This Court is of the opinion that hourly rates used by the Court of Appeals in its November 1979 remand opinion should be used as a basic starting point. It awarded Louis Lucas $125 per hour as a base fee for court work, and found that rate to be high for office services. Those services were established at $75 per hour. The only other attorneys who were awarded fees by the Court of Appeals were Mr. Noel, at $60 per hour, and Mr. Fields, at $40, with no differentiation for court and office work.

The other lawyers who are entitled to compensation are William E. Caldwell, Norman J. Chachkin and Bill Lann Lee.

Caldwell became involved in this case as an attorney from the commencement of his practice in 1970. He took a leave of absence from the firm of Ratner & Sugarmon to work with the Lawyers Committee for Civil Rights Under Law in Washington, D.C. He returned in October 1978 and assumed the role of lead counsel in these attorneys fee proceedings. As of the time of his Third Supplemental Affidavit filed August 5, 1980, he stated his "professional rate for federal litigation on behalf of the few fee-paying clients" of his was $90 per hour. This Court finds that the rates per hour to be paid him to compensate for inflation should be $90 per hour for in-court services and $60 per hour for office services.

Norman J. Chachkin was a staff attorney for the Legal Defense Fund from April 1969 until June 1975. He did much of the appellate work on the case and reviewed or duplicated the

work of local counsel in this Memphis school case. Bill Lann Lee was the staff Legal Defense Fund attorney who replaced Chachkin as overseer of the local attorneys. They are attorneys whom the Court of Appeals have ordered to be compensated. They are attorneys who had no private practice. Therefore, we look to the rates customarily charged in the community for similar services for guidance. *Id.* at 638. Their community is New York, and they say that the rates for their comparable services are $125 for Chachkin and $90 for Lee. Based upon the mandate of the Court of Appeals and the only evidence in the record, this Court establishes the rate for Chachkin to be $125 for in-court services and $75 for out-of-court services, and the rate for Lee to be $90 for in-court and $60 for out-of-court services.

The "Appellate" category includes briefing and argument — which the Court deems to be the equivalent of being "in court" on appeal — but such appeal-related services as record designation, appendix preparation, and procedural motions are categorized as "in-office" services. The Court further finds that "Appellate" services should be compensated at the same rate as "In-court" services.

Upward Adjustments

The Court of Appeals noted on page 638 of the remand opinion that the routine hourly rate of an attorney may not be the maximum which can and should be awarded because it might not take into account the special circumstances which authorize a higher fee. The Court noted that perhaps the most significant factor which renders an hourly rate unreasonably low is the fact that the award is contingent upon success.

The attorneys for the plaintiffs in their proposed findings have divided the sevices rendered into categories which are based upon the time and nature of the services rendered. There are seven such categories for services rendered after 1968. These categories and the proposed upward adjustment for the contingency factor are as follows:

	Upward Adjustment
Services Rendered Between 1968 and This Court's Liability Decision in December 1971	150%
Services Rendered Between December 1971 and June 1972	50%
Appellate Services Between June 1972 and August 1972	100%
Services Rendered During Final Plan Proceedings August 1972 — July 1973	10%
Monitoring Services 1973-80	0%
Fees Litigation 1974-79	100%
Fees Litigation November 1979 to date	0%

This method embraces in some categories the very thing that the Court of Appeals rejected as not authorized, namely the "bonus" multiplier or "windfall," 611 F.2d page 638.

For the period between 1968 and 1971, Louis Lucas and Norman Chachkin seek compensation for courtroom work at the rate of $312.50 per hour. In the opinion of this Court *this is not what the Court of Appeals mandated.*

Although the Court of Appeals allowed a 10% contingency adjustment for the 1978 fee award, which they summarily ruled upon, this Court is not adjusting the hourly rates on the basis of the contingency element. On page 641 of the remand opinion the Court of Appeals distinguished the 1978 fee award fact situation from the earlier phase of the case in the following manner:

> The hearings here involved were collateral to and distinct from the desegregation suit itself, which had been finally terminated in 1974, so had the plaintiffs failed to prevail on the merits the district court would have been justified in denying fees altogether. Therefore, there was a real element of contingency as to whether the attorneys would be compensated for their services at all.

In the post 1968 phase of this desegregation suit, the plaintiffs were seeking appropriate student and faculty desegregation against a defendant Board of Education that had openly and defiantly violated the constitution and was reluctant to come into compliance with the constitution. It was actually a matter of perseverence and allowing the trial and appellate courts to establish the ultimate standards in a rather slow trial and error method.

Plaintiffs and their attorneys were the vicarious beneficiaries of the landmark trilogy of *Green, Raney* and *Monroe*, 391 U.S. 430 *et seq.* (1968) (elimination of ineffective freedom of choice and freedom of transfer, desegregation plans); *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969); and *Carter v. West Felincia Parish School Board*, 396 U.S. 226 (1969) (do it now); *United States v. Montgomery County Bd. of Ed.*, 395 U.S. 225 (1969) (a faculty desegregation case); *Swan v. Charlotte-Mecklenburg Bd. of Ed.* and *Davis v. Bd. of School Comm'rs*, 402 U.S. 1 and 33 (1971) (the busing cases); and *Northcross v. Bd. of Ed. Memphis City Schools*, 412 U.S. 427 (1973)[3] or *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974), (attorneys fee cases).

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[3] The Supreme Court opinion in this *Northcross* case was one which indicated fees were allowable on the application of the plaintiffs based upon the first application for fees in this case, which application was made in the Court of Appeals, not this Court. In spite of the Supreme Court opinion, which was favorable for fees to be awarded, on remand the Court of Appeals for the Sixth Circuit refused to award fees because the application was untimely filed.

It must be remembered that in many instances the plaintiff took implausible, extreme positions that were not adopted. While the Court of Appeals has ruled that this does not prevent awarding fees for those unsuccessful services, those services should certainly not be a factor in a contingency additur.

Based upon the above reasons the Court hereby makes the following findings for the hours worked by the respective attorneys for the various allowable periods covered by this ruling.

Services Rendered between Plaintiffs' 1968 *Green* Motion for Further Relief and this Court's Decision of December 10, 1971:

The Court finds that the following hours of services were rendered by plaintiffs' attorneys during the period between plaintiffs' 1968 *Green* motion for further relief and this Court's opinion of December 10, 1971, holding the Board constitutionally liable for the school segregation then existing. Ten percent has been deducted for duplication.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	361 − 36.1 = 324.9	391 − 39.1 = 351.9	352.1 − 35.21 = 316.89
Caldwell	126 − 12.6 = 93.4	22 − 2.2 = 19.8	275.6 − 27.56 = 248.04
Chachkin	— — —	125 − 12.5 = 112.5	115.6 − 11.56 = 104.04

Services Rendered between December 10, 1971, and June 1972 (Plan A proceedings):

The Court finds that the following hours of services were provided by plaintiffs' lawyers during the remedial proceedings from December 1971 to June 1972.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	14 − 1.4 = 12.6	— —	70 − 7 = 63
Caldwell	96 − 9.6 = 86.4	20 − 2 = 18	243 − 24.3 = 218.7
Chachkin	— — —	— —	33 − 3.3 = 29.7

Appellate Services Rendered between June 1, 1972 and August 29, 1972:

The Court finds that the following appellate services were rendered between June 1 and August 29, 1972.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	—	24 − 2.4 = 21.6	4 − .4 = 3.6
Caldwell	—	186 − 18.6 = 167.4	35 − 3.5 = 31.5
Chachkin	—	237 − 23.7 = 213.3	27.5 − 2.75 = 24.75

Services Rendered during Plan Z Proceedings August 29, 1972 to July 1973:

The Court finds that the following hours of services were rendered by plaintiffs' counsel during the remand proceedings leading up to this Court's Plan Z orders.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	18 − 1.8 = 16.2	—	10 − 1 = 9
Caldwell	90 − 9 = 81	—	306.6 − 30.6 = 275.4
Chachkin	75(Ap) − 7.5 = 67.5	—	67.3 − 6.73 = 60.57

Monitoring Services — 1973-1980

The Court finds that the following hours of monitoring services have been provided by plaintiffs' counsel since 1973.

Lawyer:	In-Office Hours:
Caldwell	104.4 − 10.44 = 93.96
Chachkin	11 − 1.1 = 9.9
Noel	28.9 − 2.89 = 26.01
Fields	115.6 − 11.56 = 104.04

Fees Litigation —— 1974-1979

The Court finds that plaintiffs' counsel expended the following hours litigating their entitlement to attorneys fees between 1974 and the November 1979 decision of the Court of Appeals.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Lucas	8		18
Caldwell	18	202.99	278.45
Chachkin	76*	——	60.5
Noel	——	——	5

No duplication adjustment is applied to this category of service.

* Includes 70 hours from 1972-73 re: 20 U.S.C. §1617 (items 143 and 162, Ex. 1 to Chachkin Aff.).

Fees Litigation — November 1979 to Date

The Court finds that the following hours of service have been expended on the fees issue since the decision of the Court of Appeals.

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:
Caldwell	——	17.65	38.5
Chachkin	——	3.0	——
Lee	——	7.9	——

TOTAL FEE AWARD

Lawyer:	In-Court Hours:	Appellate Hours:	In-Office Hours:	Total:
Lucas	(735.2 @ $125.) $91,900.00		(410.49 @ $75.) $30,786.75	$122,686.75
Caldwell	(704.64 @ $90.) $63,417.60		(1184.1 @ $60.) $71,046.00	$134,463.60
Chachkin	(472.30 @ $125.) $29,037.50		(289.46 @ $75.) $21,709.95	$80,747.45
Fields		(104.04 @ $40.) $4,161.60		$4,161.60
Noel		(31.01 @ $60.) $1,860.60		$1,860.60
Lee	(7.9 @ $90.) $711.00			$711.00
			TOTAL:	$344,631.00

In summary the Court notes that it has accepted the hours claimed by the plaintiffs' attorneys even though in some respects they were based upon estimates due to a lack of accurate records. These hours were subject only to an "arbitrary" duplication adjustment applied to certain types of services. The Court has also increased the rate for earlier services by an inflation factor by applying a recent rate retroactively. It has also refused to award a "bonus" or "windfall," it has refused to award an "arbitrary" upward adjustment for a contingency for the period 1968 to date, and it has denied the pre-1968 claim. This represents this Court's attempt to comply with the command of the Court of Appeals as set forth in the remand opinion and in the light of the "discretion" given to district courts by the congress in the applicable statutes.

While this award appears to be a large amount of money, it must be remembered that the services extended over a long period of time and were required in a large measure because the defendant school board took a determined position not to comply with the constitution as interpreted by the rulings of the Supreme Court.

Litigation Costs and Expenses

The plaintiffs have itemized litigation expenses and costs in the amount of $35,128.22 (3d Supp. Caldwell Aff., ¶3) (Supp. Chachkin Aff. ¶¶3, 4 and Exhibit 1) (Joint Caldwell/Chachkin Aff., ¶7 and Exhibit 2). There is no dispute that the plaintiffs actually expended this amount of money in connection with this litigation, and the Court so finds.

The Court of Appeals held as follows with respect to plaintiffs' entitlement to recovery of out-of-pocket expenses (611 F.2d at 639):

> There are two separate sources of authority to award out-of-pocket expenses. Some expenses are included in the concept of attorneys' fees, as "incidental and necessary ex-

> penses incurred in furnishing effective and competent representation," and are thus authorized by §1988. . . . The authority granted in §1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the statutory authority of §1988.
>
> Other costs are on a different footing. These include those costs incurred by a party to be paid to a third party, not the attorney for the case, which cannot reasonably be considered to be attorneys' fees. . . . These include, among others, docket fees, investigation expenses, deposition expenses, witness expenses, and the cost of charts and maps. Most of these expenses have long been recoverable, in the Court's discretion as costs, pursuant to 28 U.S.C. §1920 . . . .

With respect to statutory costs, the Court of Appeals further stated as follows (*id.* at 640):

> The award of statutory costs is a matter for the district court, in its best judgment as to what was reasonable and necessary, and the appellate courts will not normally interfere with the exercise of that discretion. . . . It would be advisable for litigants to obtain authorization from the district court before incurring large items of expense, though of course, failure to do so does not bar reimbursement if the trial court should decide that the expenditures were nevertheless reasonable and necessary.

This Court disallows the following items in that they do not fit into the reasonable and necessary category:

3/31/60	Cost bond	$250.00
2/23/63	Dr. Floyd Bass, Expert	$492.58
6/4/63	Dr. Floyd Bass, Expert	$ 54.13
3/14/69	Dr. Gordon Foster, Expert	$1246.75
10/19/71	Lunch for Experts	$ 16.35
12/5/71	Dr. Gordon Foster, Expert	$218.95
1/24-26/72	Dr. Gordon Foster and Dr. Marzell, Experts	$1569.19
3/5/72	Dinner for experts	$ 39.22
2/1/72 - 3/20/72	Dr. Gordon Foster, Expert	$793.59
3/20/72	Dr. Gordon Foster, Expert	$205.78
3/28/72 - 4/5/72	Dinner Expenses for Experts	$ 44.57
12/7/73	Barry Wiener, Investigator	$ 50.00
6/12/79	Lunch	$ 3.50
6/13/79	Lunch	$ 5.00
		$7002.61

Dr. Foster was a way-out expert that recommended some extreme plans for allegedly desegregating the schools.

Therefore, the Court deducts from the expenses claimed the sum of $7002.61 and awards as reasonable and necessary expenses $28,125.61.

All amounts previously paid on the fees award herein shall be credited in the judgment, and no interest is allowed in view of the inflation factor phase of the award.

IT IS SO ORDERED.

ENTER: This 4th day of January 1982.

/s/ Robert M. McRae, Jr., Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action Nos. 2094 & 2956

Robert W. Kelley, et al,
Henry C. Maxwell, et al,
Plaintiffs,

vs.

Metropolitan County Board
of Education of Nashville
and Davidson County,
Tennessee, et al,
Defendants and
Third-Party Plaintiffs,

Mansfield Douglas, et al and
Metropolitan County Board of
Education of Nashville and
Davidson County, Tennessee,
et al,

v.

Elliott L. Richardson, et al,
Third-Party Defendants.

PETITION FOR ATTORNEYS FEES

(Filed Feb. 8, 1974)

The petitioners, Third-Party Plaintiffs in the above action, move the Court to allow them an attorneys fee in the amount of thirty-five thousand ($35,000) dollars, or in such other lessor

amount as the Court deems reasonable, and reimbursement of the costs they have incurred in the course of this litiation. This petition is filed pursuant to the authority of Title 7, Section 718 of the Emergency School Aid Act (20 USC §1617), and is based upon the following grounds:

1. The above statute provides that, upon the entry of a final order by a court of the United States against the United States or any agency thereof, for failure to comply with the Emergency School Aid Act or for discrimination on the basis of race, color or nationality in violation of the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the Court may allow the prevailing party a reasonable attorneys fee, in addition to other costs of litigation.[1] This provision became effective on July 1, 1972, and has been in effect throughout the pendency of this Third-Party action.

2. The United States Supreme Court has construed this provision to mean that a plaintiff who obtains affirmative relief in a civil rights case involving elementary and secondary education "should ordinarily recover an attorneys fee unless special circumstances would render such an award unjust", *Northcross v. Board of Education of the Memphis City Schools,* 93 Sup. Ct. 2201 (1973). No such circumstances exist in the present case. The Third-Party plaintiffs have derived no personal benefit

---

[1] "Upon the entry of a final order by a Court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin, in violation of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the Court, in its discretion, upon finding that the proceedings were necessary to bring about compliance may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the cost." 20 USC

from the assertion of their claim, the judicial assertion of the claim was clearly necessary in order to obtain the relief sought, and the judgment obtained may assist the Metropolitan School System very significantly in its efforts to achieve desegregation in accordance with the Court's previous orders. Under these circumstances an award of attorneys fees would be appropriate even in the absence of statutory authorization. *Bell v. School Board of Powhatan County, Virginia,* 321 F.2d 494, 500 (Fourth Cir. 1963) ("Attorneys fees justified when the bringing of action "should have been unnecessary and was compelled by unreasonable, obduite obstinacy") and *Brewer v. School Board of City of Norfolk, Virginia,* 456 F.2d 943, 951 (Fourth Cir. 1972) (Award of attorneys fees justified when plaintiff obtained monetary benefit for a class of persons, equivalent to a 'common fund').

3. It has been held that, in determining the appropriate of attorneys fees to be awarded in cases of this nature, the following factors may be considered: The nature of the litigation, the amount involved in the controversy, the result of the suit, the length of time spent on the case, the care and diligence exercised, and the character and standing of the attorney. *Berkshire Mutual Insurance Company v. Moffett,* 378 F.2d 1007 (Fifth Cir. 1967). The petitioners respectfully submit that the fee requested is justified on the above grounds, and that it is consistent with fees customarily paid for the performance of similar legal services in the Federal Courts for the Middle District of Tennessee.[2] The petitioners submit herewith a summary of the hours spent and expenses incurred in the preparation and presentation of the Third-Party claim in this case.

---

[2] Note for example that the private attorneys representing Metropolitan Government on appeal from the Court's latest desegregation order in the captioned case, were paid a fee of fifty thousand ($50,000) dollars.

Respectfully submitted,

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT

BY: /s/ Gilbert S. Merritt

WILLIS, KNIGHT & BARR

BY: /s/ Alfred H. Knight, III

APPENDIX K

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action Nos. 2094 & 2956

Robert W. Kelley, et al

vs.

The Metropolitan County
Board of Education, et al

MOTION OF PLAINTIFFS FOR GRANTING OF THEIR REQUESTS FOR COUNSEL FEES

Plaintiffs, by their undersigned counsel, respectfully renew their repeated requests, during the course of this litigation, for an award of costs and reasonable counsel fees; specifically, plaintiffs would show this Court that Sec. 718 of the Education Amendments of 1972, 20 U.S.C. Sec. 1617, requires such an award in their favor since they are the prevailing parties in this school desegregation case, prosecution of which was made necessary by the defendants' continuous failure and refusal to carry out their constitutional obligations, and further, that Sec. 718 requires that this Court make such an award for the entire course of this litigation, see *Bradley v. School Bd. of Richmond,* 416 U.S. 696 (1974). Plaintiffs submit herewith a legal memorandum which outlines their right to such an award.

Plaintiffs respectfully suggest that it would be appropriate for this Court to decide the issue of defendants' liability for an award of fees in favor of plaintiffs before issues concerning the amount of a reasonable award are litigated. Such a procedure would also permit the parties to attempt to settle those issues through settlement negotiations which are, however, unlikely to be fruitful in the absence of a ruling on plaintiffs' entitlement to an award. *See Bradley, supra,* 416 U.S. at 705. Accordingly,

plaintiffs do not submit herewith documentation of the thousands of hours' work performed by their counsel over the years in this matter, nor of the thousands of dollars of expenses incurred in the successful prosecution of this action. That material is being prepared, however, for submission to the Court at the appropriate time.

WHEREFORE, plaintiffs respectfully pray that upon consideration of this Motion, the Memorandum filed herewith, and after such further proceedings as are appropriate, this Court issue its Order awarding plaintiffs costs and reasonable counsel fees from the commencement of this litigation — and its predecessor *Kelley* and *Maxwell* actions— to date, and directing the parties to attempt to agree upon the amount of such a reasonable fee, reserving power unto the Court to set such amount in the absence of agreement.

Respectfully submitted,

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Attorneys for Plaintiffs

85-870

Supreme Court, U.S.
FILED
NOV 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,
Petitioners,

vs.

ROBERT W. KELLEY, *et al.*,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTAL APPENDIX A

No. 81-5370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert W. Kelley, et al.,
Plaintiffs-Appellants,

v.

Metropolitan County Board of
Education of Nashville and
Davidson County, Tennessee,
Defendants-Appellees.

Appeal from the
United States District
Court for the Middle
District of Tennessee.

Decided and Filed July 27, 1982

Before: EDWARDS, Chief Judge, JONES, Circuit Judge and CELEBREZZE, Senior Circuit Judge.

EDWARDS, Chief Judge, delivered the opinion of the Court, in which JONES, Circuit Judge, joined. CELEBREZZE, Circuit Judge, (pp. 25-35) filed a separate opinion, concurring in part and dissenting in part.

EDWARDS, Chief Judge. This much delayed school desegregation case is before this court for review of a desegrega-

tion plan approved by the District Court.[1] It offers no new legal issues and can and must be decided by this court on the basis of final decisions of the United States Supreme Court. *Milliken* v. *Bradley,* 433 U.S. 267 (1977) (Milliken II) requires our affirmance of the District Court on several issues. The cases that require our reversal of two issues decided by the lower court are legion. Leading the list are *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Green* v. *County School Board,* 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973); *Penick* v. *Columbus Board of Education,* 583 F.2d 787 (6th Cir. 1978), *aff'd,* 443 U.S. 449 (1979); *Reed* v. *Rhodes,* 607 F.2d 714 (6th Cir. 1979, *cert. denied,* 445 U.S. 935 (1980); and last but not least, *Kelley* v. *Metropolitan Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972).

It should be noted at the outset that this case is markedly distinguished in legal terms from those that have come before this and other courts from states where segregation by law has never existed or was long ago statutorily abandoned. In those cases, the federal courts have been primarily concerned with the question of whether or not predominantly black and predominantly white schools existed as a result of intentional segregative practices on the part of the school boards concerned. *See Reed* v. *Rhodes, supra; Penick* v. *Columbus Board of Education, supra; Brinkman* v. *Gilligan,* 583 F.2d 243 (6th Cir. 1978), *aff'd sub nom, Dayton Board of Education* v. *Brinkman,* 443 U.S. 526 (1979) (Dayton II). No such inquiry is necessary in this case; Tennessee's history of *de jure* segregation is well-established.

In 1955, when litigation aimed at desegregating the Nashville schools began, racial segregation was constitutionally and

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[1] *Kelley* v. *Metropolitan County Board of Education,* 511 F. Supp. 1363 (M.D. Tenn. 1981).

statutorily mandated in Tennessee, and the School Board was in full compliance with those provisions. Article 11 § 12 of the state constitution proclaimed: "No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school," and statutes consistent with this provision were enacted. *See* T.C.A. §§ 49-3701 *et seq.* In 1956, the Tennessee Supreme Court struck down the statutes requiring compulsory separation of races, *Roy* v. *Brittain,* 297 S.W.2d 72 (Tenn. 1956), and in 1959 this court invalidated a new law allowing local school boards to provide white, black and mixed schools, with attendance to be determined by parental choice. *Kelley* v. *Board of Education,* 270 F.2d 209 (6th Cir.), *cert. denied,* 361 U.S. 924 (1959). The statutes thereafter were omitted from the revised statutory compilation, with the compiler's note stating the statutes had been omitted because they were unconstitutional, citing to the above-named cases. In 1970, the Tennessee Legislature did pass a law mandating the public schools would be open to persons of all races, *see* Tenn. Code Ann. § 49-1770 (1977). But it was not until 1978 that Tennessee's constitution was amended to delete the requirement of separate schools. Finally, effective March 15, 1979, more than twenty years after the laws were declared unconstitutional, the Tennessee Legislature repealed the old school segregation statutes.

It therefore is clear that when the first "comprehensive and potentially effective desegregation order"[2] was entered in this case in 1971, the existing racial separation in the Nashville schools had resulted from *de jure* segregation. And despite the 1971 plan's potential, the record establishes and the District Court found that desegregation in the Nashville schools has never been achieved. Thus the effects of state-imposed segregation have yet to be eradicated.

---

[2] 463 F.2d at 734.

It was the School Board's implementation of the 1971 plan that prevented effective desgregation, according to the District Court. In *Kelley* v. *Metropolitan Board of Education,* 463 F.2d 732 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972), this court approved the 1971 HEW-drafted desegregation remedy, which was based on *Swann* v. *Charlotte-Mecklenburg, supra,* and which attempted to achieve desegregation through zoning. After the plan had been in effect for one year, the Board petitioned for changes, claiming hardships had arisen from the plan. The District Court emphatically rejected the petition, finding the Board had not acted in good faith in implementing the desegregation remedy. Thereafter, the Board submitted proposals for construction and for a kindergarten program using portables, which both were opposed by plaintiffs as inconsistent with the approved plan. Plaintiffs later petitioned that the Board be held in contempt for its unsanctioned implementation of the proposals. In 1978 the Board petitioned to amend school attendance zones; plaintiffs then amended their contempt petition.

In 1979, the District Court began hearings on all pending matters concerning the school system.[3] From the proof presented, the District Court found the Nashville-Davidson County school system had become increasingly segregated in the years since 1971. The original remedy had not extended throughout the county, and whites had been able to avoid the plan by fleeing to the outer reaches, leaving the inner city schools with a high black population. After reviewing the evidence, the District Court stated, "[t]he resegregation, resulting, at least in part,

---

[3] Several of the issues pending before the District Court when hearings were resumed in 1979 still have not been heard. These pending matters include allegations of discriminatory faculty and staff assignments, charges that the defendants are in contempt of court, and motions for attorneys' fees.

from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation." *Kelley* v. *Metropolitan County Board of Education,* 479 F. Supp. 120, 123 (M.D. Tenn. 1979). This "resegregation" was exacerbated by the Board's institution of an optional transfer policy that violated the spirit of the 1971 order and emasculated desegregation efforts, according to the District Court.

Judge Wiseman's determination that desegregation has never been achieved in the Nashville-Davidson County school system is amply supported by the record, and that finding, therefore, is affirmed. Thus the School Board remains under its duty "to eliminate from the public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 US. 1, 15 (1971).

EDUCATIONAL COMPONENTS

As a result of the 1979 hearings, the District Court ordered the Board to formulate a new desegregation plan "assuming no parameters heretofore ordered by the Court, but with the primary objective of the achievement of a unitary school system for the entirety of Davidson County." 479 F. Supp. at 122. After several proposals and in accordance with specific instructions from the District Court, *see Kelley* v. *Metropolitan County Board of Education,* 492 F. Supp. 167 (M.D. Tenn. 1980), the Board drafted a plan that gained the District Court's approval. *Kelley* v. *Metropolitan County Board of Education,* 511 F.Supp. 1363 (M.D. Tenn. 1981). It is plaintiffs' appeal from this order that is before us.

We affirm certain aspects of this plan. With regard to the District Judge's orders concerning education components, we approve the remediation program planned by the Board of Education's staff for "those schools or classes where the achievement levels are below the average for the system and/or

where the majority of a school's population is made up largely of socio-economically deprived children who suffer the continuing effects of prior discrimination." 511 F. Supp at 1368-69. Our affirmance of this issue does not depend upon the outcome of any other issue in this case, nor does it depend upon whether or not Title I federal funds are available. *See Milliken* v. *Bradley,* 433 U.S. 267 (1977).

Likewise, this court affirms the District Judge's order for the use of West End Junior High School as a magnet school, with selection criteria designed to provide equal access to all races. Further, we affirm the District Court's approval of the already launched Afro-American studies program. While we note plaintiffs' objections to lack of specificity of such programs, we believe this is a matter that can be handled by the District Court and the School Board without intervention by the appellate court. Finally, we affirm the Distract Judge's approval of the "Together We Can. . . Together We Will" program.

PUPIL ASSIGNMENT COMPONENT - MIDDLE SCHOOLS AND HIGH SCHOOLS

In large measure, the pupil assignment components of this plan do not withstand constitutional scrutiny. In fashioning its school desegregation plan, the Board was directed by the District Court to bring about a 15% minimum presence of either race in each middle school (grades 5-8), and application of this standard to the high schools as well was accepted by the lower court. The District Court's choice of 15% either race minimum presence as a desegregation standard would find acceptable schools that are either 85% white or 85% black. This figure is clearly not appropriate as a "starting point" in a school system that has a 68% white-32% black racial composition.[4]

---

[4] At the middle school level, seven of the 24 schools are projected as majority black, and fully one-half would fall outside of a 15% plus or minus deviation from the 32% minority presence in the school system.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-25 (1971), Chief Justice Burger wrote for a unanimous Supreme Court as follows:

> In this case it is urged that the District Court has imposed a racial balance requirement of 71%-29% on individual schools. The fact that no such objective was actually achieved - and would appear to be impossible - tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing
>
> "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . . [t]hat no school [should] be operated with an all-black or predominantly black student body, [and] [t]hat pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."
>
> The District Judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.
>
> As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual

> school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr. Finger was designated to assist the District Court to do what the board should have done.

(footnotes 7 and 9 omitted).

> We see therefore that the use of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

---

[8] The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan did not assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

As mentioned earlier, this record shows the black-white pupil ratio in the Nashville-Davidson County school system to be 68% white and 32% black. It is that ratio the District Court should have employed as the "starting point" in the remedy-fashioning process.

The District Judge selected the admittedly arbitrary 15% either race figure because "it seem[ed] to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony." 492 F. Supp. at 193. This selection, and such other errors as we find in the District Court's opinions and orders, originate with his apparent conclusion that the unanimous opinion of the Supreme Court in *Swann* has somehow been overruled or eroded. But the disposition of cases originating in this and other circuits does not support any such conclusion. In fact, *Swann* was strongly reaffirmed by the Supreme Court's approval of this court's opinion in *Penick* v. *Columbus Board of Education,* 583 F.2d 787 (6th Cir. 1978), *aff'd,* 443 U.S. 449 (1979). The *Swann* opinion is the law of the land. And this court, the District Court for the Middle District of Tennessee, and the School Board of Nashville and Davidson County are required by our constitutional form of government to follow its standards. In accordance with those standards, the District Judge will be required on remand of this case to determine the currently prevailing racial population of the school system concerned and to employ that ratio as a "useful starting point in shaping a remedy to correct past constitutional violations."

We approve all other aspects of the middle school and high school plans, recognizing, of course, that rejection of the 15% either race minimum presence as a desegregation standard will necessarily involve significant redrafting and restructuring. Whenever the *Swann* discussion set out above requires revision of these school plans, such revisions must be made. We note our awareness that this instruction encompasses *Swann's* recogni-

tion that there is no constitutional right to any "particular degree of racial balance." But we also recognize that predominantly one-race schools deserve "close scrutiny" and that the duty on the Board and courts to dismantle a dual system is clear:

> The district judge or school authorities should make every effort to achieve the *greatest possible degree of actual desegregation* and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but *in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.* Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, supra at 26. (emphasis added).

In line with this duty, we suggest the formula employed by this court in the *Columbus* case, *i.e.*, use of a 15% plus or minus deviation from the 68-32% white-black ratio for all students in the schools system.[5]

---

[5] An essential element of the plan on remand thus will include "reassigning students to achieve the greatest possible number of

PUPIL ASSIGNMENT COMPONENT - GRADES K-4

The District Court directed the Board "to establish a system of K-4 or K-5 [Kindergarten through fourth or fifth grade] elementary schools of a neighborhood character, all the while

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desegregated schools." *See Liddell* v. *Board of Education of City of St. Louis,* 667 F.2d 643 (8th Cir. 1981). We reemphasize that we are not requiring any *precise* degree of racial mixing, but we are requiring the District Court to use all feasible methods of pupil assignment to achieve the maximum amount of integration possible.

A directive to employ a racial balancing approach clearly is anything but novel. For example, this court in *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (6th Cir. 1972), *cert. denied,* 410 U.S. 926 (1973), approved the District Judge's view that *Swann* required more "intensified desegregation efforts" for Memphis than a neutral geographic zone assignment plan and his concomitant order of busing to achieve racial balance. We stated:

> It is thus clear that far from having achieved a unitary school system, the Board has helped to perpetuate the old dual system. Under these circumstances *there can be no doubt that the District Court was under an obligation to order the adoption of a plan providing for further desegregation.* Since many of the one-race schools are clearly the result of discriminatory actions of the School Board *there can be no doubt that under any interpretation of Swann the elimination of such schools must be one of the objectives of any appropriate desegregation plan.*

Id. at 893-94 (emphasis added).

It is beyond dispute that Nashville has never achieved unitary status, in large part because of the Board's implementation of the 1971 plan. We do not believe the District Court and Board fulfilled their duties to eliminate one-race schools by accepting as desegregated 85% black and 85% white schools.

We recognize our directive to the District Court in this case is quite specific. Our specificity, however, is made necessary by our view that "a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is . . . intolerable." *Green* v. *County School Board,* 391 U.S. 430, 438 (1968).

maximizing opportunities for integration in a neighborhood setting."[6] The Board complied, and this plan was approved by the District Court. This was fundamental error, unconstitutional under *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Green* v. *County School Board,* 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Keyes* v. *School District No. 1,* 413 U.S. 189 (1978); *Penick* v. *Columbus Board of Education,* 443 U.S. 449 (1979), and *Dayton Board of Education* v. *Brinkman,* 443 U.S. 526 (1979). All of these cases have held or implied that the constitutional barrier to racially segregated schools applies to *all* schools in the system, including the early grades.

In this case, the District Judge's order would serve to resegregate or to maintain segregation in grades K-4. Forty-seven of the 75 elementary schools would be more than 90% one race, with 14 schools projected as more than three-fourths black.

The District Judge based his directive on the perceived benefits of a neighborhood school system for elementary students, noting the desirability of parent-teacher contact, reduced pupil-teacher ratios, and other "educational" advantages.[7] In *Swann,* Chief Justice Burger considered pro-neighborhood arguments, presumably similar to those influencing the District Judge in this case, and found them wanting:

---

[6] 511 F. Supp. at 1371.

[7] The importance of desegregated schools, however, particularly for minority students, was recently emphasized by the Supreme Court:

> Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can

Washington v. *Seattle School District,* 50 U.S.L.W. 4998, 5002 (June 30, 1982).

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be diseirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.
>
> No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is

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achieve fheir full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes* v. *Metropolitan Branches of the Dallas NAACP,* 444 U.S. 437, 451 (1980) (POWELL, J., dissenting).

> proper to achieve truly non-discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

402 U.S. at 28.

It is thus clear from *Swann* that no matter whether neighborhood schools may be desirable on some grounds, their advantages cannot outweigh the constitutional requirement to desegregate the schools.[8]

The unanimous *Swann* opinion also dealt squarely with the issue of busing, another concern of the District Judge in this case:

> (4) *Transportation of Students*
>
> The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the

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[8] In the Supreme Court's latest consideration of the neighborhood school concept, the majority struck down a statewide initiative adopted by the voters of the state of Washington that would have required limiting school attendance to those students residing in the neighborhood of the school concerned. While the majority decision was joined by five Justices, the four dissenters emphasized that they disagreed because there was no "affirmative duty to integrate the schools in the absence of finding of unconstitutional segregation." *Washington* v. *Seattle School District,* 50 U.S.L.W. 4998 (June 30, 1982). In so doing, the four dissenters cited with approval the case upon which this opinion strongly relies, *Swann, supra.*

Thus we read *Washington* v. *Seattle School District* as unanimous on the crucial issue in our present Nashville case.

public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case, *Davis, supra.*[11] The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

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[11] During 1967-1968, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966-1967, 7,116 students in the metropolitan area were bused daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bused, and four and five-year-olds travel the longest routes in the system.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary

school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most."[12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walkin school.

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[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N. C. Gen. Stat. § 115-186(b) (1966).

Swann, supra at 29-31.

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light of what is said in subdivision (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconciliation of competing values in a desgregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

The Court's approval of transportation for elementary students illustrates the fact that these groups of children are not automatically or easily exempted from a busing program. Only when "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" should elementary children be omitted from a busing plan. No such showing was made or required by the District Court in this case.[9]

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[9] The Circuit Courts generally have disapproved desegregation plans that do not include all grades in the school system, often noting that *Brown* v. *Board of Education* itself involved segregated elementary schools. "It is axiomatic that black students, particularly in the elementary grades, suffer irreparable harm from the maintenance of a segregated school system." *United States* v. *School District of Ferndale,* 577 F.2d 1339 (6th Cir. 1978). In *Haycraft* v. *Board of Education,* 585 F.2d 803, 805 (6th Cir. 1979), *cert. denied,* 443 U.S. 915 (1979), this court rejected a plan that exempted first-graders from busing, saying, "To exempt first grade students from busing would leave vestiges of segregation intact contrary to this Court's mandate." The District Court found that first graders would be subject to "a high risk of failure" if forced to participate in a busing program, but this court found such arguments an insufficient basis for exclusion. In *Lee* v. *Macon County Board of Education,* 616 F.2d 805 (5th Cir. 1980), the Fifth Circuit disapproved a neighborhood school plan in a case much like *Kelley.* In *Lee,* grades K-5 would attend neighborhood schools with the result that two-thirds of elementary black students would attend schools more than 95% black. The District Judge had based his remedy on findings that attending a school near home was important for young children and that pairing would interfere with individualized instruction. The appellate court held these reasons "legally insufficient."

> If the decision were ours initially, we might pay greater heed to the education disadvantages of the rapid dismantling of a dual school system. We may not, however, weigh advantages against disadvantages, for that judicial balancing has already been accomplished. The law orders eradication of all vestiges of the dual system, if some feasible plan can be devised.

616 F.2d at 811 (citing *Swann* at 15).

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footnote 9 continued

The court said despite the school board's "apparent good faith attempt to desegregate in 1970," the system had never become a unitary one. Therefore, the duty to dismantle the dual school system continued, and residential patterns could not serve to justify racial imbalance. In rejecting the District Court's plan, the *Lee* court noted that the temporary or permanent presence of one or more racially identifiable elementary schools, or even an omission of some of the earlier grades from a busing program, *might* be permissible. It stressed the need, however, for detailed fact-findings indicating the circumstances motivating "any variations from complete desegregation of Tuscaloosa's schools." *Id.* at 812.

Numerous other courts have reached similar conclusions. In *Keyes* v. *School District No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), the Tenth Circuit rejected a "part-time" desegregation program for elementary students. The District Court had permitted children to spend part of the school day at their neighborhood schools, citing a need for recreational, extra-curricular and parental activities. In disapproving this plan, the appeals court stated, "although we acknowledge such neighborhood contact to be important, we cannot place it above the constitutional rights of children to attend desegregated schools. We perceive those rights to include full-time attendance in a desegregated setting." *Keyes* at 478. *See also Adams* v. *United States*, 620 F.2d 1277 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980); *Anderson* v. *Dougherty City Bd. of Educ.*, 609 F.2d 225 (5th Cir. 1980); *Mills* v. *Polk County Bd. of Educ.*, 575 F.2d 1146 (5th Cir. 1978); *United States* v. *Texas Ed. Agency*, 532 F.2d 380 (5th Cir.), *vacated and remanded on other grounds*, 429 U.S. 990 (1976), *concepts reaffirmed*, 564 F.2d 162 (5th Cir. 1977); *Clark* v. *Bd. of Educ.*, 465 F.2d 1044 (8th Cir. 1972), *cert. denied*, 413 U.S. 923 (1973); and *Flax* v. *Potts*, 464 F.2d 865 (5th Cir. 1972), *cert. denied*, 409 U.S. 1007 (1972).

Also instructive is the Supreme Court's treatment of *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437 (1980) (opinion below at 572 F.2d 1010). The Fifth Circuit had rejected the District Court's plan for desegregating Dallas on the basis that it left existing a large number of one-race schools (defined as more than 75% one-race). Under the District Court's plan, grades K-3 remained in neighborhood schools, and no busing of high school students was ordered; these limitations were largely based on the District Court's concerns over resegregation, community support, and the social and educational consequences of extensive busing. The Fifth Circuit remanded and ordered the court to rezone or to provide time and

In sum, while neighborhood schools may be desirable in a school system free of a history of segregation, where such a history exists, a plan must do more; it must make "every effort to achieve the greatest possible degree of actual desegregation." Some inconvenience and even awkward remedies may be necessary where neutral assignment plans fail to desegregate the schools.[10]

Because the remedy leaves elementary schools highly segregated, the District Court's approval of a neighborhood school plan for grades K-4 is rejected. On remand, the District Judge is instructed to include these children within a pupil assignment program drafted in compliance with this opinion, except where inclusion would "risk the health of the children or significantly impinge on the educational process" within the meaning of *Swann*.

It appears to this court that Nashville has some great advantages for solving the desegregation problem. It is a far more compact city than, for example, Cleveland or Detroit, and in general, the schools in need of desegregation are centrally located. Of equally great importance, the school system is

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footnote 9 continued

distance studies that would explain failure to use pairing and clustering or busing to eliminate one-race schools through further busing"; however, the writ was later dismissed as improvidently granted. Justices Powell, Rehnquist and Stewart dissented from the dismissal, stressing a need to affirm the District Court's "sensitive" and "promising" plan. The dismissal, however, indicates the remaining members of the court disagreed. The withdrawal of certiorari suggests, particularly in the fact of the dissent, that the majority approved the Fifth Circuit's handling of the District Court's plan. In line with the Fifth Circuit, we are ordering the lower court to eliminate as far as possible the one-race or virtually one-race schools and to explain with "time and distance studies" or by reference to "natural boundaries or traffic patterns" why elimination is not feasible for any remaining schools.

[10] *See Swann, supra* at 28.

organized on a Davidson County-wide basis. We approve the Board's and District Court's intention to apply the desegregation plan to the entire county.

As we have shown above, we are convinced the District Court's approval of the Board's plan was legal error.[11] In addition, we recognize the lower court's approval was based in part on a conviction, with which we take issue, that desegregation has not advanced the educational achievement levels of black children and that it is a serious "education cost" in the elementary grades. It was largely for these reasons, along with a fear of increased "white flight,"[12] that Judge Wiseman was persuaded to deviate from a *Swann*-type remedy. *See* 492 F. Supp. at 189-92. While doubtless the jury on the educational benefits of desegregation will be out for a long time, recent findings indicate results directly contrary to the views expressed by the District Judge. Some of this material is very current and therefore was unavailable to Judge Wiseman at the time his opinions were written.[13] We note these findings only because of the District Court's strong reliance on this matter. We also note and take this opportunity to remind the District Court that the issue of achievement scores is constitutionally irrelevant in a school system with a history of illegal segregation.

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[11] The dissent suggests that we have not employed an abuse of discretion standard in reviewing the District Court's plan. "Improper application of the law, however, is itself an abuse of discretion. An appellate court may reverse if the decision below was based on an erroneous view of the law. . . ." *United States* v. *School District of Ferndale*, 577 F.2d 1339 (6th Cir. 1978).

[12] Where the Board and court are under a duty to dismantle a dual system, white flight cannot be used to justify a failure to meet the obligation. In *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484, 491 (1972), the Supreme Court states: "While this development [white flight] may be cause for deep concern to the respondents, it cannot, as the Court of Appeals recognized, be accepted as a reason for achieving anything less than complete uprooting of the dual public school system."

[13] These findings can be found in the Appendix to this opinion.

REMAINING ISSUES

We now turn to other issues advanced by plaintiffs' appeal. First, it is urged that the approved plan places a disproportionate burden of busing on black middle school students. Any intentional effort to make the transportation burden fall more heavily on one race than on the other would, of course, be violative of basic constitutional law. Many factors, however, must be taken into account in working out a practical assignment system, including availability of schools, locations of schools, ease of travel between specific neighborhoods and specific schools, and the facilities for education existing in such schools. By mentioning these factors, we do not by any means attempt to exhaust the list; the foregoing are cited purely for illustration. With regard to the plaintiffs' middle school busing burden issue, we are unable to find the District Judge's disposition of this issue either clearly erroneous as to facts or in violation of law. It is obvious, however, that our rejection of the 15% either race minority presence as a desegregation standard will necessitate a substantial revision of the middle school busing program. Thus, the above is suggested as guidance to the District Judge in weighing a new plan.

Plaintiffs also urge the retention of Pearl High School as a senior high, objecting to its use as a middle school under the Board's plan. We, like the District Judge, sympathize with plaintiffs' argument for retention of Pearl as a high school because of its "historic contribution to the black community of Nashville," 492 F. Supp. at 184. We do not find, however, that the School Board's decision, as affirmed by the District Judge, to convert Pearl into a middle school and to build a new Pearl-Cohn comprehensive high school to be based on clearly erroneous findings or founded in a racially discriminatory purpose. Under these circumstances, we are not empowered to overturn the apparently nondiscriminatory educational decision here involved.

As to plaintiffs' last issues, however, we feel quite differently. Plaintiffs' argument that faculty and staff assignments have been made on a racially discriminatory basis should long ago have been the subject of hearing and decision. Faculty desegregation is a considerably easier task than is overall desegregation of schools. Similarly, we believe that there long ago should have been a hearing on plaintiffs' motion for attorneys' fees and expenses. Finally, we observe that plaintiffs' charges of contempt against the defendants should not be left in limbo.

From this distance, we can make no judgment on these matters since no factual record has been written. The District Court, however, should give prompt attention to all three of these issues. The delays in this case suggest that absolute priority be accorded to this litigation until a unitary system has been achieved.

The dissent in this case is in utter disregard of the Supreme Court's interpretation of the Constitution of the United States in such cases as *Brown, supra; Green, supra; Swann, supra; Keyes, supra; Penick* v. *Columbus Bd. of Educ., supra;* and *Dayton II, supra.* It goes without saying that this court is required to follow constitutional law as defined by the Supreme Court of the United States. *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803); *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

The judgment of the District Court is affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this decision.

APPENDIX

After this case was argued in this court, a study made under the auspices of Vanderbilt University and now published in the nine volume ASSESSMENT OF CURRENT KNOWLEDGE ABOUT THE EFFECTIVENESS OF SCHOOL DESEGREGATION STRATEGIES (Vander-

bilt Univ. 1981) [hereinafter cited as DESEGREGATION STRATEGIES] was released. The Vanderbilt project was financed with federal funds and incorporates the work of nationally prominent experts in the school desegregation field. It concludes that desegregation raises the level of black achievement, with specific findings on the Nashville schools, and emphasizes the importance of including primary grades in a desegregation plan. Significant findings include the following:

1. "It seems reasonably clear that minority children who attend school with white children perform better on standardized achievement tests than do children who attend segregated schools." 2 DESEGREGATION STRATEGIES at 33. *See also* Crain & Mahard, *Desegregation and Black Achievement: A Reivew of the Research,* 42 LAW & CONTEMP. PROB. 17 (Summer 1978). For example, a study of Nashville elementary schools revealed that black children's test scores rose an average of .28 when placed in desegregated schools. This amounts to a little over 3/10ths of a grade level and was termed a "sizeable" achievement gain. 5 DESEGREGATION STRATEGIES at 184. It also is estimated that desegregation tends to raise black achievement by approximately four IQ points.

2. To boost achievement, desegregation must occur in the early grades.

> The findings that strong effects of desegregation occur in the earliest grades are a strong argument against delaying desegregation past grade one. Only a few school systems leave the early primary grades segregated; the most significant is Dallas. Our analysis indicates that this is a very unfortunate policy. Many school systems leave kindergarten students segregated. This analysis suggests it would be academically very beneficial to include minority kindergarten students in a desegregation plan.

Id. at 185.

The study concludes that desegregation "creates a sudden burst of achievement growth" during the early grades and that after that time, desegregated students maintain but do not increase this higher level of achievement. The study also notes, "[N]o desegregation plan where elementary grades are excluded can effectively reduce racial isolation. Moreover, the research suggests that desegregation at early grades holds the greatest promise for improving race relations, increasing minority achievement and ultimately reducing racial prejudice." *Id.* at 70.

3. Racial proportions in the school are related to achievement. The study suggests that minority students score higher when they are in predominantly anglo classrooms; however, it is important that more than a small number of minority students attend majority schools. Where minority students comprise less than 15% of the school's population, little mixing of races occurs, and where blacks make up less than 20% of a high school's population, black male achievement suffers. *Id.* at 115, 173, 186 and 196.

4. Where a school district is organized on a county-wide basis, as is the Nashville-Davidson County school system, "white flight" has much less long-term impact on the schools, *Id.* at 47.

A 1981 study by the National Assessment of Educational Progress, a federally sponsored group that annually tests 9-, 13- and 17-year-olds, reports that black achievement scores have increased significantly over the past 10 years. In an assessment of reading performance, the study found that while black students still scored below white students, they had narrowed the gap considerably. For example, 9-year-old black students were 14.2 percentage points below the national norm in 1971 in literal

comprehension, but in 1980 black students were only 7.1 percentage points below the national average. This result was achieved in the fact of an overall achievement gain for *all* tested students. Black students scored achievement gains at all three age groups, although increases were more significant for the 9-and 13-year-olds than for the 17-year-olds.

This black achievement gain extends from reading into other disciplines, according to Burton & Jones, *Recent Trends* in *Achievement Levels of Black/White Youth,* EDUCATIONAL RESEARCHER (April 1982). That article analyzes tests administered over five subject areas form 1969 to 1980 by the National Assessment of Educational Progress and concludes:

> For the learning areas other than writing, the average difference between white and black 9-year-olds has shrunk from about 17 percentage points to 10 or 11 over the 1970s. At age 13 (Figure 5) methematics is relatively the most difficult area for black students. For the areas other than mathematics, means for 13-year-old black students were 17 to 18 percentage points below those for white students in 1970, but only 12 to 13 points below by 1980. A decrease in the difference between white and black students over time is evidence at both ages.
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> * * *
>
> Typically, when achievement for white students has declined, that for black students has declined less; when whites have improved, blacks have improved more. The difference between the races has decreased at both ages in mathematics, science, reading, writing and social studies.

Id. at 11-12, 14.

Neither the National Assessment project nor authors Burton and Jones go so far as directly to attribute black achievement gains to desegregation. It is stated, however, that the findings

"cast doubt on judgments that these social programs have failed." Burton and Jones, *supra* at 10.

These recent studies, published after the District Judge's decision, undercut his finding that the black-white achievement gap has narrowed only "slightly" and that improvement had plateaued in 1975. *See* 492 F. Supp. at 190-91 n. 46. On the contrary, the impact of these studies is that desegregation raises the level of black achievement.

CELEBREZZE, J., concurring in part and dissenting in part.

I concur in the majority's decision to affirm the educational components of the district court's plan: the establishment of remediation programs, the creation of a magnet school at West End Junior High School, and the development of an Afro-American studies program. I disagree, however, with my distinguished colleagues and the portion of the decision that reverses the district court's pupil assignment plans. After a careful reading of the record in this case, I believe that the Davidson County community, the board of education, and the district judge are making significant progress towards affording a constitutionally acceptable educational system and that this court should allow the local community and federal court to proceed with their innovations and programs. In my view, the district court did not make clearly erroneous findings of fact and did not abuse its discretion in forming its remedy.

I.

This appeal is part of a desegregation case which has spanned a generation and raises issues concerning the breadth of the district court's discretion and the scope of this court's review. A brief examination of the district court's conclusions is, therefore, necessary.

In 1971, after sixteen years of litigation, the district court adopted a comprehensive desegregation plan which required an "ideal student ratio" of 15 to 35 percent black students in each school and ordered substantial additional busing for the 1971-72 academic year. This court affirmed the 1971 order, reasoning that the decision was within the discretion of the district court. *Kelley* v. *Metropolitan County Board of Education,* 463 F.2d 732 (6th Cir. 1972). The litigation continued intermittently through the 1970's and, in 1979, the district court ordered the parties to reconsider the 1971 desegregation plan in light of the disparate busing burdens, the need to expand the georgraphic scope of the remedy, and changes in the racial composition of and distribution in the community.

This district court held extensive hearings concerning the effectiveness of the 1971 remedy. The school board established a citizens' advisory panel and a planning team which included outside consultants; after a series of public meetings, the board proposed a new desegregation plan. The plaintiffs responded with objections, recommendations, and suggestions for the district court. The district court heard expert testimony and considered various studies concerning test scores, transportation burdens, and white flight, as well as the social, economic, and educational costs of competing desegregation plans.

In evaluating the possible desegregation remedies, the district court made extensive findings of fact. The court found that the Nashville and Davidson County school system had experienced significant white flight under the 1971 busing order.[1] The court further found that white flight was expected to continue so that

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[1] The extent of white flight under the 1971 busing remedy has apparently been substantial. In June, 1971, 66,393 white students attended Metropolitan Nashville schools; in June, 1979, the number had dropped to 44,295. Based on several empirical studies, the district court concluded that the decline was, at least in part, the result of white flight and the resegregation from the 1971 busing order. 492 F. Supp. at 189-90; 479 F. Supp. at 122-123.

25 to 30 percent of the county's elementary school children would be in private schools by the middle or late 1980's. It emphasized that the flight stemmed largely from the public's perception that the system's educational quality was poor. Second, the court found that although test scores for black and white pupils had improved under the 1971 plan, the gap between the scores of the two groups had remained constant. Third, the district court found that the school board's proposed desegregation plan placed a disparate burden on black children, especially those in the early elementary grades, by requiring that black children be bused in numbers disproportionate to their share of the population. Fourth, the district court found that extensive busing plans would have substantial social, economic, and educational costs. 492 F. Supp. at 189-92; 479 F. Supp. at 122-23.

Based on these findings, the district court outlined specific guidelines for a new desegregation plan for the county. Initially, the court extended the geographic reach of the plan to include the entire county.[2] It ordered the school board to send children in grades K to 4 to neighborhood schools, maximizing the desegregation within this limitation.[3] It ordered that in grades 5

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[2] Because of the vast distances in Davidson County, the district court limited the 1971 busing remedy to the densely populated core of the County. After finding that this limitation was hindering the implementation of an effective desegregation remedy, the district court ordered the school board in 1979 to devise a new plan which extended the geographic scope of the busing plan. 479 F. Supp. at 122-23.

[3] In deciding that children in grades K to 4 should go to neighborhood schools, the district court noted that "an objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30-31 (1971). The district court relied on its detailed findings of fact and concluded that neighborhood schools were necessary for children in grades K to 4.

to 8, the objective should be a minimum presence of 15 percent of either race in each school.[4] In addition, the district court outlined various changes in curriculum, staff, and programs for the Nasvhille school system.

II.

I believe that the majority opinion does not adquately address the district court's findings of fact. With regard to factual questions in desegregation cases, the question on review is whether the findings of fact are clearly erroneous. Fed. R. Civ. P. 52(a). *See Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 534 n.8 (1979) (*Dayton II*). This court may not reverse findings of fact unless it is left with the firm conviction that a mistake has been made. *Alexander* v. *Youngstown Board of Education,* 675 F.2d 787, 795-96 (6th Cir. 1982). *See, e.g., Reed* v. *Rhodes,* 607 F.2d 714, 717 (6th Cir. 1979), *cert. denied,* 445 U.S. 935 (1980); *Penick* v. *Columbus Board of Education,* 583 F.2d 787, 789, 798 (6th Cir. 1978), *aff'd,* 443 U.S. 449 (1979). This court may not deviate from that standard when it addresses factual findings with which it is vaguely dissatisfied. *See Dayton II,* 443 U.S. at 418.

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[4] The district court observed that:

> The selection of 15 percent is arbitrary, as is any other number which may be chosen. Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of Brown and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation or amalgamation. It is not undemocratic, nor does it violate equal protection of the laws to have a system that allows for recognition of and respect for differences in our society. A rigid adherence to racial ratios premised upon the social goal of assimilation, which in the process demeans, disminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable.

492 F. Supp. at 193.

The majority opinion does not subject the district court's findings concerning disparate busing burdens on black children, loss of community support, heavy economic expenses, and significant educational costs under the 1971 plan to careful scrutiny to determine whether they are clearly erroneous. For example, the majority requires the district court to include children in grades K to 4 in its busing plan unless inclusion would "risk the health of the children or significantly impinge on the educational process." *Swann,* 402 U.S. at 30-31. The district court, however, did make findings concerning the educational effects of the remedy on young school children and expressly noted the *Swann* exception.[5] In addition, rather than evaluate the findings concerning white flight and its pertinence to the district court's choice of remedy, *see* notes 1-2, *supra,* the majority simply rejects the notion that the threat of flight is a valid reason for failing to adopt any desegregation plan, a question not presented here.[6]

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[5] 492 F. Supp. at 189-92. *See* note 3, and accompanying text, *supra.*

[6] The threat of white flight may not, of course, be the basis for obstructing a desegregation remedy once a constitutional violation has been found. *See, e.g., Monroe* v. *Board of Commissioners,* 391 U.S. 450, 459 (1968). The concern for white flight in cases where a *Swann* remedy has been in operation for some time, as here, does not reflect an attempt to defeat desegregation efforts, but is considered so that the plan will be effective in the long run.

United States v. *Scotland Neck City Board of Education,* 407 U.S. 484, 491 (1972), indicates that the risk of white flight does not permit a school board to avoid the responsibility of eliminating a dual school system. A district court, however, may consider such a risk in selecting the most desirable plan from among several constitutionally permissible desegregation remedies. In *Stout* v. *Jefferson County Board of Education,* 537 F.2d 800 (5th Cir. 1976), the Fifth Circuit, in examining the application of *Scotland Neck,* stated:

> We have found no authority declaring that in choosing between various *permissible* plans a chancellor may not elect to minimize white boycotts. The teaching of *Scotland Neck* is that he may not refuse to adopt a permissible plan and elect or confect one which preserves a dual system because of such fears. The true issue, then, is whether the plan adopted by the court below was, given the circumstances, a permissible one.

As this court has been previously admonished by the Supreme Court:

> [o]n appeal, the task of a court of appeals is defined with relative clarity; it is confined by law and precedent, just as are those of the district courts and of this Court. If it concludes that the findings of the district court are clearly erroneous, it may set them aside under Fed. Rule Civ. Proc. 52(a). If it decides that the district court has misapprehended the law, it may accept that court's findings of fact but reverse its judgment because of legal errors. Here, however, as we conceive the situation, the Court of Appeals did neither. It was vaguely dissatisfied with the limited character of the remedy which the district court had afforded plaintiffs, and proceeded to institute a far more sweeping one of its own, without in any way upsetting the district court's findings of fact or reversing its conclusions of law. *Dayton I,* 433 U.S. at 417-18.

After carefully examining the record and extensive findings of fact in this case, especially those concerning population shifts,

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Id. at 802. In this case, the district court evaluated the risk of white flight in determining the *scope* of its busing remedy, not in determining whether to afford a remedy at all. These are entirely separate questions. Other courts have held that the threat of flight is a proper consideration in framing a permissible desegregation plan. *See Johnson* v. *Board of Education of Chicago,* 604 F.2d 504, 517 (7th Cir. 1979), *vacated for consolidation,* ____ U.S. ____ (1982) (a school board may "consider the probability of white flight in formulating a remedial plan to prevent *de facto* segregation in public schools"); *Parent Ass'n of Andrew Jackson High School* v. *Ambach,* 598 F.2d 705, 719 (2nd Cir. 1979); *Higgins* v. *Board of Education of the City of Grand Rapids,* 508 F.2d 779, 794 (6th Cir. 1974).

educational quality, transportation burdens, and social costs, I am not left with conviction that the district court's factual findings are clearly erroneous.

III.

Furthermore, I believe that the majority has erred in its review of the district court's desegregation remedy. When reviewing a district court's desegregation remedy, we are limited to determining whether the district court abused its discretion.[7] *See Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977); *Swann*, 402 U.S. at 15, 25, 27, 30. The Supreme Court has identified the standard for review as the traditional abuse of discretion measure applied to equitable decrees: in a desegregation case, "the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable decrees." *Swann*, 402 U.S. at 15. This discretion comports with the policy of leaving the administration of desegregation plans with the district courts.[8] "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these [desegregation] cases can best perform this judicial appraisal." *Brown II*, 349 U.S. at 299-300.

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[7] The courts of appeals have held that the standard of review in a desegregation case is whether the district court abused its discretion. *E.g.*, *United States* v. *Board of School Comm'rs of Indianapolis*, 637 F.2d 1101, 1116 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980); *Evans* v. *Buchanan*, 582 F.2d 750, 760 (3rd Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923 (1980); *Stout* v. *Jefferson County Board of Education*, 489 F.2d 97, 98 (5th Cir. 1974) (per curiam); *Kelly* v. *Guinn*, 456 F.2d 99, 110 (9th Cir. 1972), *cert. denied*, 419 U.S. 919 (1979). *See also Arthur* v. *Nyquist*, 636 F.2d 905, 906 (2nd Cir. 1981).

[8] This court may reverse a district court in its formulation of a desegregation remedy only when it has abused its discretion, because the district court is in the best position to weigh the competing equities.

I disagree with the majority's view of the district court's discretion. The majority implies that the district court is obligated to employ a racial ratio which matches the racial composition of the Davidson County school system. My reading of *Swann* is that the district court *may* adopt such a ratio as part of a desegregation remedy. The Constitution does not require the district court to use a ratio which mirrors the racial makeup of the community. *Swann*, 402 U.S. at 23-24. Rather, the district court may use its discretion to determine the proper scope of a busing plan in a desegregation remedy.[9]

The majority's treatment of the pupil assignment component of the desegregation plan is not consistent with the limited scope of our review. The district court did use in 1971, as a "starting point," the approximate racial ratio of the school district as an objective for its busing plan. The district court in 1980 reviewed

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> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Hecht Co. v. *Bowles*, 321 U.S. 321, 329-30 (1944), cited in *Brown II*, 349 U.S. at 300, and *Swann*, 402 U.S. at 15. *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1972) ("[i]n shaping equitable decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow").

[9] The Eighth Circuit has expressly rejected the argument that the desegregation plan for the St. Louis school system must precisely reflect the racial composition of the district. The district court adopted a pupil assignment plan which considered schools with black enrollment of 30 to 50 percent (plus or minus 15 percent) in a system which is 76 percent black. The appellate court found that such deviations are within the discretion of the district court. *Liddell* v. *Board of Education of St. Louis*, 667 F.2d 643, 649 (8th Cir. 1981).

the effectiveness of the 1971 order. After hearing and evaluating a broad range of evidence concerning white flight, test scores, transportation burdens, costs, education theory, and other factors, the district court changed the busing objective to a minimum presence of 15 percent of either race.

The majority opinion seems to recognize that there is no constitutional right to any particular racial balance in schools. *See Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 434 (1976) (no "substantive constitutional right to a particular degree of racial balance of mixing" exists); *Swann,* 402 U.S. at 24. Yet the majority's requirement that the district court employ a ratio of 68 percent white and 32 percent black (plus or minus 15 percent) appears to be an attempt to establish such a balance. I fear that the precise racial mixture required by the majority on remand will, as a practical matter, create such a right. *See Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 418 (1977) (*Dayton I*).

Moreover, I disagree with the majority's treatment of the pupil assignment component for grades K to 4. The majority rejects the district court's decision on the premise that it is required to desegregate all schools and all grades within the school system. I do not believe that the district court's discretion is so narrow. The cases on which the majority relies for its proposition do not support its conclusion.[10] In *Haycraft* v. *Board of*

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[10] The majority's reliance on *Tasby* v. *Estes,* 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed as improvidently granted,* 444 U.S. 437 (1980), is misplaced. First, the circuit court did not hold that *Swann* requires all schools and all grades to be included in a pupil assignment program. It remanded the case because the district court, unlike the lower court in this case, failed to make adequate factual findings. *Id.* at 1014. Second, the Fifth Circuit has expressly ruled that a district court "may devise a constitutional plan that temporarily or permanently leaves one or more racially identifiable elementary schools, or that omits some of the earlier grades from the busing probram." *Lee* v. *Macon County Board of Education,* 616 F.2d 805, 812 (5th Cir.

Education of Jefferson City, 585 F.2d 803 (6th Cir. 1978), *cert. denied,* 443 U.S. 415 (1979), this court reversed a district court which excluded first grade students from a busing plan. In *Haycraft,* the district court made no factual findings; instead, it concluded "as a matter of law" that first grade students without kindergarten experience would risk failure if they rode on a bus to school. *Id.* at 804. Here, the district court made extensive factual findings, supported by the record, and grounded his decision on the risk that the entire desegregation remedy might fail in the long run if very young children were included in the busing program. 492 F. Supp. at 189-93. *Lee* v. *Macon County Board of Education,* 616 F.2d 805 (5th Cir. 1980), does not hold that every grade in a school system must be included in a desegregation remedy. In fact, the Fifth Circuit reasons that "[f]ocusing on the target of a unitary system rather than a systemwide racial balance, the court may devise a constitutional plan that temporarily or permanently leaves one or more racially identifiable elementary schools, or that omits some of the earlier grades from the busing programs." *Id.* at 812. *See generally Swann,* 402 U.S. at 24 ("[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole").

Finally, the majority fails to address directly the issue of the effectiveness of the desegregation plan.[11] "The measure of any desegregation plan is its effectiveness." *Davis* v. *School*

1980). Third, the Supreme Court's decision to dismiss certiorari as improvidently granted provides no indication of the Court's view of the merits and gives the *Estes* decision no precedential power binding on this court. *See Griffin* v. *United States,* 336 U.S. 704, 716 (1958); *United States* v. *Carver,* 260 U.S. 482, 490 (1923).

[11] The Supreme Court's opinion in *Washington* v. *Seattle School District No. 1,* ___ U.S. ___ (1982), does not address the issues raised in this appeal. In *Washington,* the Court found that a state referendum which prohibits mandatory busing of school children for purposes of integration violates the equal protection clause of the four-

Comm'rs of Mobile, 402 U.S. 33, 37 (1971). District court decrees must ultimately be evaluated on the basis of their effectiveness. *See Green* v. *County School Board,* 391 U.S. 430, 439 (1968) (desegregation remedies must be drawn "in light of the circumstances present and the options available"); *Davis,* 402 U.S. at 37 (desegregation remedies must "tak]e] into account the practicalities of the situation"). An effective desegregation plan is one which will establish a unitary school system: "The obligation of the district courts . . . is to assess the effectiveness of a proposed plan in achieving desegregation." *Green,* 391 U.S. at 439. Many factors should be considered in determining whether a particular plan will be effective in establishing a unitary school system. These factors include population shifts,[12] transportation burdens, and the social, economic, and educational costs of competing desegregation plans. The precise weight to be acorded to each factor should be left to the district court's discretion. In my opinion, the district court has properly identified and weighed these various factors and has selected a desegregation remedy which is likely to move Davidson County

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teenth amendment. *Washington* concerns the structure of the state and local political process, rather than the breadth of a district court's discretion in shaping a desegregation decree: "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible." Slip Op., at 28 n.29 ____ U.S. ____, ____ n.29. The Supreme Court has recently reiterated the policy of encouraging flexibility in desegregation remedies and avoiding rigid approaches: "although 'in some circumstances busing will be an appropriate and useful element in a desegregation plan,' in other circumstances 'its "costs," both in financial and education terms, will render its use inadvisable.' " *Crawford* v. *Los Angeles Board of Education,* Slip Op. at 14, *quoting Crawford* v. *Board of Education,* 17 Cal.3d 280, 309 (Cal. 1976), ____ U.S. ____ (1982). *See* Slip Op. at 2 n.3, 9 n.15.

[12] *See* notes 1 and 6 and accompanying text, *supra.*

towards a unitary school system.[13] If lasting solutions for the problems of desegregation are to be found, we must allow the district courts to shape remedies which reflect the practical problems facing a school system and which have a realistic chance of achieving the goals of *Brown I*.

A careful reading of the entire record, and my experience with the previous appeals filed in this litigation, leads me to believe that Judge Wiseman has addressed a difficult problem and is, together with the local community, making a sincere effort to bring a degree of finality to this longstanding issue. I believe that the district court's plan complies with the requirements of *Brown I* and *Swann*. The district court's findings of fact are not clearly erroneous and it has not abused its broad discretion in fashioning the flexible and innovative plan presented to this court. Accordingly, I would affirm the judgment of the district court.

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[13] The majority relies on *Tasby* v. *Estes*, 572 F.2d 1010 (5th Cir. 1978), *cert. dismissed as improvidently granted*, 444 U.S. 437 (1980), asserting that the dismissal of certiorari as improvidently granted is an indication that the Supreme Court supports the majority's interpretation of *Swann*. Although the Court's disposition allows no such inference to be drawn, *see* note 10, *supra*, Justice Powell's dissent, joined by Justices Rehnquist and Stewart, is of interest. The dissent emphasizes the need for flexibility and practicality in reviewing desegregation decrees.

SUPPLEMENTAL APPENDIX B

Robert W. Kelley, Individually and
representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Henry C. Maxwell, Jr., Individually
and representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Civ. A. Nos. 2094, 2956.

United States District Court,
M. D. Tennessee,
Nashville Division.

Aug. 27, 1979.

(Rendered Orally Aug. 24, 1979)

In desegregation action, the District Court, Wiseman, J., held that: (1) given the choice between further delay and implementation of desegregation plan or a haphazardly hurried piecemeal implementation of a portion of the program, court would permit additional year's delay; (2) board's transfer policy, although facially neutral, was having a negative impact; (3) it would violate due process to hold school board members in contempt for the implementation of the school transfer policy where the prior orders of the court had not addressed the matter with sufficient specificity; (4) school board would be required to review transfer applications and determine this validi-

ty before granting them; and (5) the application of any senior to be retransferred to the school which he attended as a junior could be granted.

Order accordingly.

1. Schools (key) 13(20)

Court facing the choices of a further year's delay in implementing a portion of school desegregation plan or a haphazardly hurried construction of partial patches of the plan which would probably worsen the situation would permit the proposed zones of the school board to be continued for use for another year.

2. Schools (key) 13(6)

School board policy for subject matter-program transfers from one school to another, although racially neutral on its face, had a negative impact on desegregation efforts by the manner in which it was implemented and the inherent potential for abuse in its conceptualization and thus violated spirit of court's integration order.

3. Constitutional Law (key) 273

It would violate due process to hold school board members in contempt for implementation of transfer plan where court's desegregation orders did not address the matter with the requisite degree of specificity. U.S.C.A. Const. Amends. 5, 14.

4. Schools (key) 13(20)

Where court had determined that school board's transfer policy which was facially neutral was having a negative impact on desegregation efforts, court would order school board to submit a revision of the transfer policy designed to provide methods by which transfer applications could be objectively

judged, prior to approval, to determine their validity as to the educational objectives of the student; court would require board to review each of the transfer applications which had previously been approved, as well as those currently pending and to make written findings as to the validity of each request.

5. Schools (key) 13(20)

School board would be permitted to grant the application of any senior who requested transfer from a school to which he had been zoned to the high school to which he attended as a junior and such transfers would be exempted from limitations on other transfers set forth in court's desegregation orders.

Avon N. Williams, Jr., Richard Dinkins, Nashville, Tenn., for plaintiffs.

William R. Willis, Jr., Marian F. Harrison, Nashville, Tenn., for defendants.

MEMORANDUM

WISEMAN, District Judge.

This twenty-four-year-old case is before this Court upon a series of motions and petitions by both the plaintiffs and defendants. The various motions, petitions, and pending matters and dates of filing are as follows:[1]

1. March, 17, 1972: Defendants' request for approval of construction of White's Creek Comprehensive High School, included in march 17, 1972, report to this Court and merged into July 24, 1978, petition, listed *infra*.

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[1] Throughout the pendency of this case until and during the recent hearings, the parties have filed various motions relating to discovery matters. The Court has ruled on substantially all discovery issues as they have arisen. Such matters are, therefore, not listed above as pending motions.

2. May 30, 1973: Petition by defendants for approval of long range plan, dealing with twenty-six building projects. This petition has essentially merged into more recent pleadings.[2]

3. May 31, 1973: Defendants' petition for approval of portables for use in kindergartens. No action was taken by the Court in regard to this petition and the defendants subsequently implemented the proposed plan.

4. October 14, 1976: Defendants' motion to amend their May 30, 1973, petition for approval of long range plan. Such motion proposed a new location for the Goodlettsville-Madison High School and asked the Court for approval of construction of that school.

5. December 27, 1976: Plaintiffs' petition for contempt and further relief. Plaintiffs therein moved that defendants be held in contempt for their plan to construct the Goodlettsville-Madison High School, the expansion of Hillsboro, Bellevue, Hillwood, Glencliff, Stratford, and Maplewood high schools, the use of portables for kindergartens, the establishment of the Cole Annex for Cole Elementary School grades five and six at the old Turner School, and the proposed closing of Pearl High School. The Board of Education subsequently rejected the proposal to close Pearl. In this petition, plaintiffs also asked that the Court modify its 1971 order to equalize the burden placed on black and white children as a result of bussing, to compel defendants to maintain a black-white student ratio, and to force defendants to upgrade Pearl High School and inner city schools. Finally, plaintiffs requested attorneys' fees.[3]

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[2] Subsequent to the May 30, 1973, petition, defendants have filed various letters to inform the Court of their plans and actions taken relating to the projects detailed in the petition.

[3] Plaintiffs had previously filed motions for attorneys' fees on February 8, 1974, and April 11, 1975, as well as a motion to dispose of those motions, filed on October 16, 1975.

6. July 24, 1978: Defendants' petition for approval of school attendance zones for 1978-79, as amended August 18, 1978. In this petition, defendants requested court approval of the expansion of Hillsboro, Hillwood, Overton, Maplewood, Glencliff, and Stratford into comprehensive high schools with grades nine through twelve, the addition of grade nine to Cohn and Pearl high schools and to McGavock Comprehensive High School, the opening of the Whites Creek Comprehensive High School to include grades nine through twelve, the elimination of one grade schools, the changes in zoning to alleviate overcrowding and to close inadequate buildings, the plan to develop an inner city comprehensive high school, and the establishment of junior high schools including grades seven and eight with feeder systems into the high schools.[4]

7. August 28, 1978: Plaintiffs' amendment to petition for contempt and for further relief, previously filed on December 27, 1976, and discussed *supra*. Plaintiffs therein allege that construction and expansion of schools in predominantly white areas, and the closure of formerly black schools in the inner city, the institution of optional transfer programs, discussed *infra*, and the failure of defendants to increase the black-white faculty ratio are violative of the 1971 court order.

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[4] On May 29, 1979, defendants filed an amendment to the list of capital improvements and to proposed attendance zones, in which plaintiffs deleted from the May 30, 1973, petition a request for approval for an Interstate 40 West comprehensive high school, and substituting a plan for an inner city comprehensive high school, and modified the proposals relating to Antioch, Dupont, and Bellevue high schools. On July 6, 1979, the Court granted the defendants' amendment to their request for approval of certain building projects, in which defendants withdrew their request for approval of construction of Antioch High School, the Glengarry Elementary School project, the Jordonia-Wade Elementary School project, and omitted the projects proposed for Dupont and Bellevue high schools.

8. August 7, 1979: Plaintiffs' motion for contempt, which charged that defendants had violated the Court's order directing defendants to terminate the optional transfer plan, discussed *infra*.

In pretrial conferences held with all parties, the Court divided the matters into four phases:

Phase 1: Historical recapitulation of school integration since the order of 1971; consideration of the Long Range Plan of the school board; consideration of the proposed zoning for school year 1978—79 (now moot since the year 1979—80 was only one month away at the time of the hearing); consideration of the Board's request to proceed with certain construction projects.

Phase 2: Consideration of matters relating to racial mix of staff and faculty.

Phase 3: Consideration of all petitions for contempt.

Phase 4: The matter of attorneys' fees.

The Phase 1 hearings began on June 26, 1979, and continued on June 27, 28, 29, 30, 1979, and July 2, 3, 5, and 6, 1979. The proof on Phase 1 overlapped substantially with the matters of Phase 3.

At the conclusion of this hearing, the Court directed the defendant, Board of Education, to reconsider its entire plan assuming no parameters heretofore ordered by the Court, but with the primary objective of the achievement of a unitary school system for the entirety of Davidson County. In addition, the Board was instructed to consider: maximum utilization of existing buildings (specifically including those in the inner city); economic factors of transportation costs and fuel economy; time and distance involved in transportation; and any other factors which would impact upon the ultimate objective of a quality educational opportunity for all children in Davidson County through a unitary school system.

The defendant Board has advised the Court that the foregoing request of the Court is a massive undertaking which, if approved by the Court, will represent a substantial redrawing of zone lines and transfer of numerous students.

From the proof adduced on Phase 1 of the hearings, the Court finds the following:

1. The perimeter line drawn by the Court in 1971, by which no requirement of either transportation or attempts at racial balance was mandated outside the perimeter, has encouraged white flight to the suburbs and to those school zones unaffected by the 1971 order. The combined effect of the order and the flight therefrom, either to suburban public schools or to private schools, has been:

a) that inner city schools have become progressively resegregated;[3]

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[3] The most dramatic example of such resegregation can be seen in enrollment statistics for Pearl High School for the school years 1970—71 through the projections for 1979—80, compiled in Exhibit 87, as follows:

	Black Students/ Percentage Black	White Students	Total Students
1970-71	1212 (100.0)	0	1212
1971-72	599 (62.9)	353	952
1972-73	603 (66.4)	305	908
1973-74	594 (68.4)	274	868
1974-75	558 (74.7)	188	746
1975-76	551 (72.5)	208	759
1976-77	551 (75.8)	175	726
1977-78	492 (83.1)	100	592
1978-79*	577 (96.6)	20	597
Projection 1979-80	532 (96.6)	19	551

*9th Grade Added

b) that the projected ideal ratio of 15 percent to 35 percent black population in each school has become increasingly more difficult to meet;

c) that the school facilities outside the Court-ordered perimeter have become increasingly inadequate to accommodate the growing student bodies.

2. The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation.

Recognition of the above results impels a complete reexamination of the remedy fashioned in 1971. As the United States Supreme Court has said,

> The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. . . . Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. . . .

Green v. *School Bd. of New Kent County*, 391 U.S. 430, 439, 88 S.Ct. 1689, 1695 20 L.Ed.2d 716, 724 (1968). *See also Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19-21, 91 S.Ct. 1267, 1278—79, 28 L.Ed.2d 554, 569—70 (1971).

[1] Although any delay in achieving an adequate remedy to a situation in which Davidson County children are deprived of constitutional rights is distasteful, the alternatives and the most appropriate remedy among such alternatives have not yet been the subject of proof in this case at this time. The Court is therefore left with the equally untenable choices of a further year's delay or a haphazardly hurried construction of partial patches which would undoubtedly worsen the situation. The problem faced by the parties in this suit, by this Court, and by

the citizens of this county is of paramount importance. It deserves the best efforts at resolution that can be mustered by everyone concerned. It is a subject upon which the best minds available to the parties, including input from the many well-motivated, thoughtful citizens of the community, should be sought and received. The 1979-80 school year is less than a week away. Massive restructuring of zones at this time would be chaotic. For all of these reasons, delay, however undesirable, becomes the only option available to the Court. The proposed zones of the Board for the year 1978—79 are approved for use in 1979—80. Over the coming year, this Court will hear from the parties, and invites amicus briefs by groups such as the Citizens Advisory Committee, Parent-Teacher groups, and any other interested group. The Court encourages such groups to submit proposals which are designed to achieve a unitary school system in Davidson County and to provide the best possible educational opportunity for all of the school children of the county.

The Optional Transfer Policy

In 1978 the School Board adopted a transfer policy which permitted any student assigned to a non-comprehensive high school to opt out automatically of such school to a comprehensive high school (Exh. 21). At the July hearings, it became evident to the Court that this provision had been utilized extensively by white students assigned to Pearl to escape such assignment. The percentage of automatic options out of Pearl compared to those from other non-comprehensive high schools leaves no other credible inference.[6] The effect of this policy upon the already-established trend toward resegregation at Pearl was disastrous. From the 1977—78 school year to the 1978—79 year, the black to white ratio went from 83.1 percent to 96.6 percent (Exh. 87).

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[6] Exhibit 20 itemizes the number of students who transferred to a comprehensive high school from non-comprehensive high-schools in 1978-79 under the optional transfer program. Interpolating these figures to reflect the number of students transferring from Pearl and other non-comprehensive high schools to comprehensive high schools, the resulting chart is as follows:

At the hearings in July, when the foregoing facts became apparent, the Court orally enjoined the Board of Education from further implementation of this transfer policy. The Court's directive from the bench was:

School	White	Black	Other	Total
From Pearl	290	21	12	323
to Glencliff	34	0	0	34
to Hillsboro	35	10	2	47
to Hillwood	220	8	10	238
to Overton	1	3	0	4
From Antioch	62	5	0	67
to Glencliff	62	5	0	67
From Apollo Jr.	50	1	0	51
to Glencliff	50	1	0	51
From Bellevue	8	0	0	8
to Hillsboro	8	0	0	8
From Cohn	66	19	0	85
to Hillsboro	31	14	0	45
to Hillwood	35	5	0	40
From Madison	47	2	0	49
to Maplewood	1	0	0	1
to Whites Creek	46	2	0	48
From Dupont (Jr. & Sr.)	37	4	0	41
to McGavock	37	4	0	41
From East	10	3	0	13
to Stratford	10	3	0	13
From Goodlettsville	68	5	0	73
to Whites Creek	68	5	0	73
From Joelton	149	0	0	149
to Whites Creek	149	0	0	149
From Neely's Bend	3	0	0	3
to Whites Creek	3	0	0	3
Total	790	60	12	862*

*Exhibit 20 also reflects that 11 white students transferrred from Hillsboro to Hillwood. Since those transfers are not from non-comprehensive schools to comprehensive high schools, they are not listed in the above chart.

> I am making this ruling now, Mr. Willis, because as I see the urgency of the situation that has arisen during the course of the proceedings, I think I need to do that because you need to know what I am deciding on in the 1978—1979 [sic][1] school year. I think it is going to take considerable work by the School Board on this ruling because it is going to move several hundred students or determine from them whether or not there is a bona fide reason for program transfers and in anticipating it on a program transfer basis rather than an automatic opting out. So, I am telling you that now, so you have plenty of time to work on it, we will continue to do that as we can through this hearing. I will supplement all of this in a written memorandum and give you a chance for appeal and whatever. When I see something I need to address in order to be ready for the 1978—1979 [sic] school season, I will address it.

Thereafter, on August 7, 1979, plaintiffs filed a petition for contempt alleging that the Board had failed to implement in good faith the Court's order. This petition was scheduled for the first order of business at the resumed hearings which began August 21 and continued through August 24, 1979.

From information provided through discovery, plaintiffs introduced statistical summaries of transfers approved, broken out by sending school, receiving school, and by race (Exh. 98). From this exhibit it appears that 326 white students have had transfers approved from Pearl to other high schools in the system. Sixteen blacks and twelve persons of other races were granted transfers from Pearl. All of the transfers from Pearl were subject matter based. The number of transfers from other non-comprehensive high school were:

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[1] The Court erroneously referred to the school year 1978—79. The Court, of course, intended to refer to the school year 1979—80.

	White	Black	Other
From Joelton	134	0	0
From Cohn	85	25	2
From Antioch	38	1	0
From Dupont Sr.	32	0	0
From Madison	31	3	0
From Goodlettsville	23	8	0

The impact of these transfers upon the racial mix at Pearl was dramatic. Children assigned to Pearl by applicable residential zones should have produced a racial mix of:

532 white (52%)

36 other (3%)

461 black (45%)

After the approved transfers were granted, the resulting totals and percentages were:

206 white (30%)

24 other (4%)

445 black (66%)

Additional transfer requests are pending from Pearl of 78 white, 17 black, and 4 other (Exh. 142). If these transfers are approved, the white population will be reduced to 22 percent.

The apparent mass exodus of white students from Pearl under the subject matter transfer raised a serious question in the Court's mind as to the extent of monitoring which defendant Board had exercised in its implementation of the spirit if not the letter of the Court's enjoinder from the bench in July. From the statistical evidence above, the Court found a prima facie case of contempt to have been made and shifted the burden of going forward with the evidence to the defendants.

The School Board explained its procedure in implementing the court's order as follows:

1. The School Board was informed at its July 10 meeting of the Court's order and the need for modification of the Board's policy.

2. The Board at its July 24 meeting rescinded its optional transfer policy. Dr. Elbert Brooks, Director, Metropolitan Schools, stated to the Board that "students who had made these automatic transfers would be assigned to their original zoned school but would be permitted to request a transfer in order to take a particular program/subject not offered at the student's assigned school."

3. A form letter was developed and signed by Dr. Brooks and sent to all students who for the school year 1978—1979 had been assigned to a non-comprehensive high school under the "automatic option" policy (Exh. 96).

4. A Transfer Committee was established consisting of Mr. Joe Garrett, Chairman, Pupil Accounting and Transfers, Pupil Personnel Services; Dr. Cornell Lane, Psychology, Pupil Personel Serivces (a black member); Mr. Bill Hollingsworth, Attendance, Pupil Personnel Services; and Mr. Dan Covington, Vocational and Technical Education. A directive was issued by Dr. Brooks requiring that requests for transfer be forwarded to the office of Mr. Garrett for review by the Transfer Committee. After such review the two affected principals and the students were to be notified.

5. Principal Carnes of Pearl High testified he was informed at two meetings held with other principals and his district superintendent that his sole function was to determine if the requested course was available at his school and, if not, to sign off on the request. This instruction was reiterated by Dr. Brooks in a phone call after a school board member relayed parent com-

plaints to Dr. Brooks about Mr. Carnes' handling of transfer requests. Somewhat inconsistently, the testimony also showed that Mr. Carnes understood and Dr. Brooks also reiterated to him his responsibility to counsel with the student and parents concerning such a transfer.

At some point after the transfers began to be requested, the form for such applications was changed. The material change was the deletion of an addendum which listed courses taken in the previous year, grades received, and courses desired this year. It also required a statement that the program of studies had been discussed with both the principal and guidance counselor and an explanation thereof. Finally, it required a selection of a course not offered at the assigned school and a statement of how the requested course would be beneficial to the student. No satisfactory explanation of the changes in the form was offered by defendants.

Notably after the fact, after the filing of the petition for contempt, Dr. Brooks required a comparison of the subject/program transfers granted with the students preregistration desires indicated last spring (Exh. 137). This comparison as it relates to transfers from Pearl reveals the following:

Transfer Requests for Programmatic Reasons Approved by Student Transfer Committee
Metropolitan Nashville Public Schools
As of August 16, 1979

Spring Preregistration Course Selections Compared to Fall Registration Course Selections (Reason for Transfer Request)

Sending School	Receiving School	Number Approved				Fall Course Selection Same As Spring Selection				Fall Course Selection Not Selected in Spring, But Spring Selection Not Offered at Sending School				Fall Course Selection Not Selected in Spring, Spring Selection Similar to Course Offered at Sending School				All Courses Selected in Spring Offered at Sending School				Number Spring Schedule Available
		B	W	O	T	B	W	O	T	B	W	O	T	B	W	O	T	B	W	O	T	
Pearl	Hillsboro	2	45	2	49	1	25	0	26 (58.1%)	1	7	0	8 (16.3%)	0	0	0	0	0	11	2	13 (26.5%)	2 (4%)
											(69.4%)											
Seniors																						
Others	- 2																					
Black	- 0																					
White	- 9																					
Total	- 11 (22.4%)																					
Pearl	Hillwood	5	170	10	185	1	103	4	108 (58.4%)	1	55	3	59 (31.9%)	0	0	0	0	0	13	1	14 (7.6%)	4 (2.2%)
											(90.3%)											
Seniors																						
Others	- 2																					
Black	- 0																					
White	- 37																					
Total	- 39 (21.1%)																					
Pearl	Glencliff	1	94	0	95	0	42	0	42 (44.2%)	0	34	0	34 (35.8%)	0	1	0	1 (1.1%)	1	10	0	11 (11.6%)	7 (7.4%)
											(80.0%)											
Seniors																						
Others	0																					
Black	0																					
White	19																					
Total	19 (20.0%)																					

It is apparent from this summary that 69.4 percent of the transfers from Pearl to Hillsboro, 90.3 percent of the transfers from Pearl to Hillwood, and 80 percent of the transfers from Pearl to Glencliff were facially *bona fide* under the policy of the Board and the understanding of Dr. Brooks, discussed *infra*. In the case of the one white transfer from Pearl to Glencliff wherein the fall course selection was not selected in the spring, and the spring selection is similar to a course offered at the sending school, and in the case of those 38 transfers to comprehensive high schools in which all courses selected in the spring are offered at Pearl, the transfers are facially suspect.

Dr. Brooks testified that a follow-up interview will be scheduled with each of these individuals in the suspect category in an effort to determine the *bona fides* of the students' expressed desires. Such a monitoring is consonant with the policy adopted in 1977 by the Board in Section IV(F)(4) of the Student transfer Policy # 5119: "Special requests having evidence of course or program selection and changes in courses scheduled for the purpose of *school reassignment* will not be approved" (emphasis added).

Dr. Brooks further testified that, in his opinion, there is no reliable way to explore the legitimacy of a subject/program tranfers except after the fact. In pursuance of this belief, the chairman of the Transfer Committee developed a three-part monitoring plan, to which Dr. Brooks added a fourth, by which the Board will follow the progress of each transfer student in the requested courses (Exh. 139). Actual enrollment is to be verified and progress checked at six-week and semester intervals and evaluated for renewal of transfer.

The Board's actions before the filing of the contempt petition leaves much to be desired. Dr. Brooks admitted in hindsight that the comparison with spring course selection should have been examined before the fact rather than after. The Court

believes that the use of the longer form, changed in midstream apparently in the interest of time, would have produced information for a more objective evaluation of the *bona fide* nature of the application for tranfer.

The statistical evidence of transfers of white students from Pearl gives rise to the inescapable inference that white students, given the opportunity to automatically opt out of the Pearl zone last year, certainly did not wish to return. Perhaps many of these represent legitimate desires to attend a comprehensive high school and take courses offered there but not at Pearl. Black children are not exercising this program/subject opportunity in nearly the equivalent numbers or percentages, however. This may be due in part to a corresponding desire by black students to attend a majority black school; it may be related to the ethnic pride of the black community in Pearl High as an institution. For whatever reason, it is a fact evidenced by the admitted statistics of both 1978—79 and 1979-80 transfers.

The Board has adopted, as a part of its long range plan of construction of comprehensive high schools, a plan to construct an inner city comprehensive high school, to be named Pearl, and at a location either on the present site or at some place in the North Nashville area. Originally, the Board had gone forward with the recommendation of the staff for the closure of Pearl, Cohn, and Joelton high schools upon the theory that none of these locations fit into the judicially imposed directive to locate comprehensive high schools in areas which would encourage and facilitate an integrated school system. Objections by the black community to the closure of Pearl brought about a reversal of this decision within the past year.

Another factor which has impinged upon the School Board's action in regard to Pearl, as well as other non-comprehensive high schools in the system, is the requirement by Tennessee law that all students in grades nine through twelve be given access to

a comprehensive high school education by 1978 (T.C.A. §§ 49-2701 *et seq.*). As long as Pearl and other non-comprehensive high schools were either scheduled for closure or had not yet been converted to a comprehensive facility, the Board felt obligated to provide the "automatic option," or at least the program/subject option on an "as required" basis.

The subject matter/program transfer plan was "loosely conceptualized and leniently administered." (Testimony of Dr. Scott). The Board of Education did not follow it own policies relating to subject matter transfers, specifically Sections IV(A) and IV (F) of the Student Transfer Policy # 5119. No preapproval screening was done to determine how the requested subject fit into a student's career objectives. No effort was made to ascertain if the requested subject correlated with the student's career objectives expressed at spring registration or if, in fact, any change had taken place in those career objectives by the fall registration. No guidance counseling input was sought or received before approval was granted. Transfer approval was automatic if the requested course was not offered at the sending school and if such course was not already full at the receiving school. No effort was made to tabulate course requests and to determine if a sufficient demand existed to establish the requested course as an offering at the sending school. For instance, in applications to transfer away from Pearl, there were at lease 38 requests for horticulture, 18 requests for German history, 38 requests for media arts, 34 for computer programming, and 22 for vocational cluster. Such numbers would seem sufficient to establish classes in these subjects at Pearl. It would have been both feasible and reasonable to include a question on the request for transfer form inquiring whether or not the student would be willing to take the requested course at Pearl if it were offered there after a sufficient expression of interest. Such an inquiry was not made.

The looseness of the administration of the subject matter/program transfer policy and its pro forma approval can have no other effect than to emasculate any efforts at desegregation. Zoning becomes a farce under the expressed attitude of Dr. Brooks as to his understanding of a student's automatic right to course offerings at another school. Many of these courses have no relationship whatsoever to the vocational program outlined in T.C.A. §§ 49—2701 et seq. As this Court reads that law, the variety of vocational offerings in the Metropolitan School System is not required to be duplicated at every school nor is every student required by this law to be given access to every course at every school.

[2] The Court finds that the school board policy for subject/program transfers, although racially neutral on its face, by the manner in which it has been implemented and the inherent potential for abuse in its conceptualization, has a negative impact upon the desegregation efforts of the School Board pursuant to the previously issued order of this Court, and violates the spirit of the 1971 order, and the spirit of the order of this Court issued orally on July 2, 1979.

[3] The Court, however, does not find defendants in contempt of the July 2, 1979, order of this Court. In that order, the Court directed defendants to abolish the optional transfer plan. It is indisputable that defendants complied with that order. In the July 2, 1979, order the Court did not deal specifically with the subject matter/program transfer plan, which was the central issue of the recent hearing. As the Court of Appeals for the Sixth Circuit has recently held, "The notice of a judicial order upon violation of which a contempt finding may properly be based is such notice as would clearly tell a reasonable person what he is required to do or abstain from doing." *Reed* v. *Cleveland Bd. of Educ.*, 607 F.2d 749, 752, (6th Cir. 1979). It would violate due process to hold defendants herein in con-

tempt for their implementation of the subject matter/program transfer plan when the Court did not address the matter with that degree of specificity necessary under the standard hereinabove set out.

[4] It is, therefore, ORDERED that:

1. The School Board reexamine and submit to this Court for approval by September 7, 1979, a revision of its subject matter/program transfer policy designed to provide methods by which transfer applications may be objectively judged prior to approval, to determine their validity in the educational objectives of the individual student, as opposed to a subterfuge on the part of a student to escape a given school or subvert the zones established for the purpose of achieving a unitary school system.

2. The School Board shall conduct a review of each of the transfer applications that have been heretofore approved as well as those now pending. Such a review will include an interview with both the student and parent or guardian. After such review, the Board will make written findings in each case of the validity of the request. A procedure will be established to obtain the recommendation of the principals from the sending and receiving schools and the judgment of the transfer committee. Such a procedure will also make provisions for an appeal to the Director. The decision of the Director, on appeal, shall be in writing and shall include the supporting reasons for his decision. Such a review of all previously granted requests will be made by September 7, 1979. The defendants will give first priority to reviewing those previously granted requests for transfers out of Pearl High School.

3. By September 7, 1979, the School Board shall submit to the Court for its approval recommendations relating to a plan to establish additional classes at Pearl and/or other non-

comprehensive high schools when the number of requests for transfers from such sending schools are sufficient to justify the establishment of such classes. This order does not suggest or require the conversion of all high schools into comprehensive high schools. The Board will necessarily make value judgments between establishing courses such as computer sciences or vocational clusters, on the one hand, which may not be economically feasible to develop at, for example, Pearl, and establishing courses such as German history, horticulture, and guitar, which would not require mass expenditures if such courses were offered at Pearl.

4. Those students whose requests for transfer have been heretofore approved will register at and begin attending the school to which they requested to be transferred. The School Board shall reassign to the schools to which the students were originally zoned those students whose requests for transfer the transfer committee and/or the Director finds to be less than *bona fide* and reassign to the original zoned school those students who requested a course subsequently offered at that school, under paragraph three of this order.

5. Those students whose requests for transfer are pending and those students who have not yet requested transfer will register at and attend the school to which they were originally zoned until such time as the defendants evaluate their requests for transfer under the revised plan.

6. Pursuant to the order and memorandum, filed August 27, 1979, the defendant Board may grant the application of any senior (as defined in that memorandum opinion), who requests transfer from a high school to which he is zoned to the high school to which he attended as a junior in the year 1978—79.

The Court does not intend to alter the provision of the 1971 Court order, incorporated in Section XI of the Board's policy §

5119 (Exh. 21), that allowed students to transfer from "majority to minority" schools. Such provision has previously permitted a student, who is a member of the majority race in a particular school, to transfer automatically, without a program related reason, to the closest school in which that student would be a member of the minority race. The Court, however, will not condone transfers from, for example, Pearl, by white students in grades nine through eleven, when the effect of such a transfer will be to convert the majority at the sending school into a minority, or convert the minority at the receiving into a majority. The Board shall allow any student to transfer from a school in which he is *presently* in a majority to any school in which he would be *at that time* a member of a minority, in accordance with the defendants' previous majority to minority plan. If, however, by the operation of the revised transfer plan and/or the majority to minority plan, the racial mix is altered so that a student in grades nine through eleven would not be transferring from a school in which he is presently a member of a majority to a school in which he would be at that time a member of a minority, the majority to minority rule will not justify approval of a request to transfer.

The Court recognizes that the foregoing directives are temporary and will be obviated by the completion of the comprehensive high school program.

MEMORANDUM

[5] Defendants have moved this Court to exclude those students who will be seniors in the year 1979—80 from the Court's order of August 24, 1979, relating to subject matter/program transfers. Plaintiffs have responded in opposition to defendants' motion.

In her affidavit attached to defendants' motion, Dr. Peggy Harris, research assistant for defendant Board of Education, states that the sixty-six white students, designated as seniors for

the year 1979—80, have requested and been approved for transfer from Pearl to a comprehensive high school. This figure represents approximately 20 percent of the 326 white students in grades nine through twelve, originally zoned to Pearl, whose requests for transfers out of Pearl have been approved (Exh. 98): In addition, Dr. Harris stated that there were presently thirteen requests for transfer out of Pearl from white seniors whose applications were pending decision by defendant Board.

In defendants' motion, they note the testimony elicited at the recent hearing from Leslie Carnes, Principal of Pearl High School, and Dr. Elbert Brooks, Director of Metropolitan Schools, regarding the special status of seniors who may have bought senior rings and made plans to participate in athletic and extracurricular activities. Plaintiffs, however, point out that the problems of seniors were not the subject of extensive proof at the hearings. They, therefore, argue that the special situation of each senior should be evaluated by the defendant Board on an individual basis when the Board reconsiders its prior grant of approval of transfer requests and initially considers pending transfer requests. Although plaintiffs contend that it is not equitable to permit those who have achieved a wrongfully acquired status to profit from such status, they also appear to be sensitive to the potential special needs and problems of seniors.

This Court has found that the previously utilized optional transfer plan and the Board's recent implementation of the subject matter/program transfer plan had a debilitating effect on desegregation efforts in this school system. Toward the end of halting the rapid trend of reversion to an almost totally black inner city school, the Court ordered that the optional transfer plan be terminated and the method by which the program transfers were granted be radically revised so that program transfers could be based on *bona fide* educational reasons rather than on a means to escape a traditionally black, inner city school.

The Court has attempted to fashion a remedy that will eliminate the negative effects of the previous policies of defendant Board. In fashioning such a remedy, however, it is the Court's responsibility to balance the relative detriments and benefits to the school children, who will be affected by the Court's order. The Court cannot decree in a theoretical void; it must be cognizant of the specific situations involved and the harm that may befall individual children. The Court is not insensitive to the special status of high school seniors who have made plans according to the assumption that they would be attending the same school for their last year as they attended their junior year. Such plans may have entailed expenditure of money for class rings and senior pictures, and a commitment to participate in, *inter alia,* athletic and band activities, school clubs, and student government. To destroy a student's plans for the last year of high school and to wrest him away from the school he has known and the friendships he has developed has the potential for thwarting a child's academic and social adjustment and fulfillment of his educational goals. To uproot a child who has spent at least the last year in anticipation of completing his high school education in the same environment offends this Court's sense of justice. The potential harm in such upheaval weighs heavily in favor of an exclusion for seniors from the revised transfer plan.

The Court, therefore, grants defendants' motion to exclude seniors from the Court's order of August 24, 1979. The Court will permit the defendant Board to grant the application of any senior who requests transfer from a school to which he attended as a junior in the year 1978—79. The Court adopts the definition of "senior" used by defendants as any student who, based on his number of credit hours, is capable of graduating from high school during the regular school year of 1979—80 plus the summer school term of 1980. An exemption for seniors will be incorporated into the final version of the Court's order of August 24, 1979. This order of exemption of seniors from the revised program transfer plan will be in effect only for the year 1979—80, and will not be extended beyond that year.

SUPPLEMENTAL APPENDIX C

Robert W. Kelley, Individually and
representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Henry C. Maxwell, Jr., Individually
and representative of the class

v.

Metropolitan County Board of Education of Nashville
and Davidson County, Tennessee, et al.

Nos. 2094, 2956.

United States District Court,
M. D. Tennessee,
Nashville Division.

May 20, 1980.

In a school desegregation case, the District Court, Wiseman, J., held that: (1) the desegregation plan proposed by the Board of Education, which recommended more busing to achieve more racial balance, would be rejected, because it placed most of the burden of achieving desegregation on young black children and might lead to a public school system serving only the lower social or economic segments of society, and (2) the Board should consider a plan such including features as neighborhood schools for kindergarten and lower elementary grades, a minimum presence of at least 15 percent of the race in the minority at middle schools, the use of magnet schools, the use of public transportation, and educational components to improve the opportunity of school children for intercultural experiences.

Judgment accordingly.

See also D.C., 479 F.Supp. 120.

1. Schools (key) 13(4)

Once finding has been made that racially discriminatory dual school system has been maintained, it is responsibility of school board, under supervision of district court, to achieve unitary school system.

2. Schools (key) 13(6)

In determining remedy for school segregation, effectiveness of proposed desegregation plan must be weighed against other available alternatives and each alternative must be assessed in terms of its relative costs.

3. Schools (key) 159½

Desegregation plan proposed by the Board of Education, which recommended more busing to achieve more racial balance, would be rejected, because it placed most of the burden of achieving desegregation on young black children and might lead to public school system serving only lower social or economic segments of society.

4. Schools (key) 13(12)

Board of Education should consider desegregation plan including features such as neighborhood schools for kindergarten and lower elementary grades, minimum presence of at least 15 percent of race in minority at middle schools, use of magnet schools, use of public transportation, and educational components to improve opportunity of school children for intercultural experiences.

Avon N. Williams, Jr., Richard H. Dinkins, Nashville, Tenn., Plaintiffs Intervenors, Carrol D. Kilgore, William E. Higgins, Nashville, Tenn., for plaintiff.

William R. Willis, Jr., Marian F. Harrison, Nashville, Tenn., for defendants.

MEMORANDUM OPINION

WISEMAN, District Judge.

The present posture of this case and this Court's action thereon require a recitation of the tortuous twenty-five-year history of desegregation efforts in Metropolitan Nashville.

I. HISTORY OF NASHVILLE-DAVIDSON COUNTY DESEGREGATION PRIOR TO 1971

On September 23, 1955, plaintiff Robert W. Kelley filed this class action lawsuit to enforce *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), decided the previous year, and to enjoin the defendant Board of Education of the City of Nashville from continuing to operate a segregated school system. A three-judge court was convened in this district,[1] but, upon defendants' concession that the law was unenforceable under *Brown*, the three-judge court was dissolved for lack of jurisdiction and the case remanded to a single district judge of this Court. *Kelley* v. *Board of Educ.*, 139 F.Supp. 578 (M.D.Tenn. 1956).

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[1] The three-judge court was convened pursuant to 28 U.S.C. § 2281, since plaintiffs contested the constitutionality of Tennessee law mandating segregation, T.C.A. §§ 49-3701 to 49-3704. These statutes, enacted in 1901, prohibited interracial schools and the teaching of interracial classes. Misdemeanor penalties were prescribed for violation of this law. Section 49-3701 provided that "[i]t shall be unlawful for

After a hearing on the proposed plan for desegregation submitted by the defendant Board, the Court, on January 21, 1957, approved the plan insofar as it provided for desegregation for grade one in the year 1957-58, but ordered the Board to develop a plan to eliminate segregation in the remaining grades. *Kelley* v. *Board of Educ.*, 2 Race Rel.L.Rep. 21 (M.D.Tenn.1957). On February 18, 1958, this Court rejected as unconstitutional the Board's proposed plan, essentially modeled after the Parental Preference Law, T.C.A. § 49-3704,[2] passed in January of 1957, and previously held unconstitutional by this Court in *Kelley* v. *Board of Educ.*, 2 Race Rel.L.Rep. 970 (M.D.Tenn.1957). The proposed plan proscribed mandatory integration or segregation in any grade but permitted parents to choose between sending their children to a one-race or integrated school. The Court allowed the defendant Board two months to file another plan

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any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning." Acts 1901, ch. 7, § 1; Shann., § 6888a37; Code 1932, § 11395. Correlatively, section 49-3702 provided as follows:

> It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement.

Acts 1901, ch. 7, § 2; Shann., § 6888a38; Code § 11396.

[2] Section 49-3704 read as follows: "Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and Negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race." Acts 1957, ch. 11, § 1.

for desegregation of all grades.[3] *See Kelly (sic)* v. *Board of Educ.*, 159 F.Supp. 272 (M.D.Tenn.1958). On June 19, 1958, this Court approved the proposed Board plan that provided for elimination of compulsory segregation in grade two as of the academic year 1958-59 and in one additional grade a year therafter. *See Kelley* v. *Board of Educ.*, 3 Race Rel.L.Rep. 651 (M.D.Tenn.1958), *aff'd*, 270 F.2d 209 (6th Cir.), *cert. denied*, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959).[4]

At the time *Kelley* v. *Board of Education* was filed, Davidson County, surrounding Nashville, and the City of Nashville maintained separate school systems. Because the *Kelley* order had no effect upon the county school system, which continued to operate as a segregated system, plaintiff Henry C. Maxwell, Jr., filed a class action complaint on September 19, 1960, which paralleled the complaint previously filed by plaintiff Kelley against the Board of Education of the City of Nashville. On November 23, 1960, this Court approved a gradual desegregation plan submitted by defendant County Board of Education but modified the proposed one-grade-a-year component to require that immediate desegregation take place in grades one through four with an additional grade each year in the future. By so ordering, the Court placed the county school system on the same grade-a-year basis as the city school system. *See Maxwell* v. *County Bd. of Educ.*, 203 F.Supp. 768 (M.D.Tenn.1960), *aff'd*, 301 F.2d 828 (6th Cir. 1962), *aff'd in*

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[3] At the same time, the Court denied defendants' motion to dismiss that was grounded on the adequacy of the administrative remedy provided in the Pupil Assignment Act, also enacted in January of 1957. *See* Pub.Acts 1957, cc. 9-13.

[4] Plaintiffs appealed from the Court's order because they asserted that *Brown* mandated that desegregation be achieved with more celerity than one grade per year. Defendants, on the other hand, appealed the Court's ruling that the portion of the plan that implemented the Parental Preference Law was unconstitutional.

part, rev'd in part, sub nom. Goss v. *County Board of Educ. of Knoxville,* 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).[5]

On September 10, 1963, after the City of Nashville and Davidson County merged into a metropolitan government, the *Kelley* and *Maxwell* cases were consolidated by consent order and the Board of Education for Metropolitan Nashville-Davidson County was substituted as defendant.[6] The case has remained in the same posture since 1963, with the primary defendant being the Metropolitan County Board of Education of Nashville and Davidson County. No significant action was taken by this Court in regard to school desegregation until over six years later.[7]

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[5] The plan, as approved by this Court and affirmed by the Court of Appeals, included a minority-to-majority transfer option for students who would otherwise be zoned to schools in which they would be in a racial minority. This provision is the converse of the majority-to-minority transfer policy *currently* in effect in Nashville-Davidson County. The United States Supreme Court granted certiorari to decide the constitutional validity of the minority-to-majority transfer provision of the school plan for Knoxville, Tennessee, as approved by the District Court for the Eastern District of Tennessee, *Goss* v. *Board of Educ.*, 185 F.Supp. 559 (E.D.Tenn.1960), and affirmed by the Court of Appeals for the Sixth Circuit, *Goss* v. *Board of Educ.*, 301 F.2d 164 (6th Cir. 1962), as well as such policy included in the *Maxwell* plan. The Supreme Court reversed, holding that the minority-to-majority provision of both plans was constitutionally defective. *Goss* v. *Board of Educ.*, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

[6] The 1963 consent order substituted the Transitional Board of Education for the Metropolitan Government of Nashville and Davidson County as defendant. By order of December 3, 1964, the Metropolitan Board of Education and its board members were substituted for the Transitional Board.

[7] In the interim, the plaintiffs challenged an action taken by the defendant school board and the state secondary athletic association, which had suspended a predominantly black, inner city school from participation in the interscholastic athletic program. The Court ruled that due process had been denied in the procedure used for suspending the school. The Court did not, however, deal with any aspects of the pupil assignment portion of the desegregation plan. *See Kelley* v. *Board of Educ.*, 293 F.Supp. 485 (M.D.Tenn.1968).

Upon plaintiffs' motion for injunctive relief, this Court, on November 6, 1969, issued a temporary restraining order, enjoining defendant Board from purchasing new school sites, building new school facilities, or expanding existing school facilities, until a hearing on the motion. After such hearing, the Court, on July 16, 1970,[4] enjoined the Board from school construction not commenced as of the date of the restraining order, and ordered that the Board devise a comprehensive plan for a unitary school system that included, *inter alia,* rezoning and school construction to maximize school integration. *Kelley* v. *Metropolitan County Bd. of Educ.*, 317 F.Supp. 980 (M.D.Tenn.1970). The defendant submitted a plan as ordered, but, on August 25, 1970, the Court effectively stayed its order until resolution by the United States Supreme Court of school desegregation cases then pending before it.[5] On December 18, 1970, however, the Court of Appeals for the Sixth Circuit vacated the stay and reinstated this Court's order. *Kelley* v. *Metropolitan County Bd. of Educ.*, 436 F.2d 856 (6th Cir. 1970).

II. THE 1971 COURT ORDER

Pursuant to the remand order of the Court of Appeals, this Court held hearings on the Board's proposed revised plan in the spring of 1971. At such hearings, a plan was submitted by the Board, a plan by the plaintiffs, including alternate plans for the elementary schools, and two alternate plans submitted by the Department of Health, Education, and Welfare [HEW], acting as consultant to the Court. The Court rejected defednants' pro-

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[4] The opinion was issued on July 16, although the judgment was not entered until August 13, 1970.

[5] The most significant case involved was *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

posal, calling it a "mere tinkering with attendance zones," and "only a token effort." *Kelley* v. *Metropolitan County Bd. of Educ.*, Nos. 2094, 2956, at 6 (M.D.Tenn. June 28, 1971).[10]

The Court similarly rejected both of plaintiffs' proposals because they allowed the school board to determine the actual assignment of pupils and implementation of the plan. In light of the Board's past actions and apparently half-hearted efforts to devise a unitary school system that would encourage integration, the Court was naturally reluctant to delegate to the Board the responsibility for specific implementation. Additionally, the Court rejected the elementary school plans proposed by plaintiffs because they included some schools in the periphery of the county. The Court at that time found that the distances involved and the attendant busing costs were so great that it was not feasible to include the outer reaches of the county in a comprehensive busing plan.[11]

The Court did adopt the element in both plaintiffs' and defendants' plans that instituted an "ideal student racial ratio" in the range of 15 to 35 percent black in each school. After rejecting both plaintiffs' and defendants' plans, the Court viewed the HEW plan, as amended after evidence adduced at the hearings, which incorporated geographic zone changes, clustering,

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[10] Although the opinion was issued by this Court, it is impossible to refrain from commending my predecessor on this case, now Chief Judge L. Clure Morton, for an opinion that was remarkable not only in its portrayal of courage by its author in light of the certain community hostility that ensued but also for its forthrightness and clarity in treating the legal mandates and decreeing specific directives and proscriptions.

[11] Noting that the "practicality and feasibility of a plan is a material consideration," the Court made it clear that the litmus test for a unitary school system was not necessarily the integration of each school within the system. *Id.* at 8.

contiguous and noncontiguous pairings, and grade restructuring, as the "only realistic plan remaining." *Id.* at 8. Perhaps most significant in terms of its total impact on the school system, the Court, in an effort to insure a racially unitary school system, ordered that over 13,000 more students be transported in the 1971-72 school year than had been bused in the previous year. *Id.* at 4-5.[12] Under the pupil assignment plan as submitted by HEW and adopted by the Court, no school would have a majority of black students.

To discourage future resegregation, the Court made specific orders designed to maximize the potential for an integrated system. Included in the Court's order was a directive for the Board to implement a majority-to-minority transfer policy. The Court also approved the proposed construction of what was later built as the Whites Creek Comprehensive High School because of its proximity to the proposed inner city expressway loop, located approximately half-way between predominantly black and white residential populations. The Court enjoined the construction of the proposed Goodlettsville Comprehensive High School because it would be located in an all-white community and not in proximity to the line of demarcation between the two populations. The Court similarly denied the Board permission to enlarge Hillsboro High School, located in a white community, into a comprehensive high school, enjoined the use of portable classrooms for any purpose other than integration, and, finally, although exempting the predominantly white schools in the outer county from the effect of busing, enjoined the Board from renovating or enlarging by either construction or use of portables any schools that serve less than 15 percent black students after implementation of the plan.

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[12] Approximately 10,500 more elementary school children were to be bused, and 2,838 more secondary children were to be transported. *Id.* at 4-5.

Both parties appealed the 1971 decision of this Court.[13] The defendants appealed on the bases of the Court's asserted failure to comply with Rule 23 of the Federal Rules of Civil Procedure, the invalidity of the Court's requirement of a fixed racial ratio, and the alleged adverse effects on the health and safety of the children resulting from implementation of the plan. Plaintiffs cross-appealed, claiming that their proposed plan should have been approved by the Court because it would have achieved a greater degree of integration and because the HEW plan, as accepted, placed a disproportionate burden upon black children. The Court of Appeals for the Sixth Circuit affirmed on all grounds, focusing on the discretion lodged with the district court and on the fact that some of the claims raised on appeal had not been adequately raised first in the district court.[14]

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[13] The memorandum opinion was issued on June 28, 1971, whereas the order was issued on July 15, 1971. On July 21, 1971, this Court denied defendants' motion to set aside the memorandum opinion of June 28 on the basis of the Court's alleged failure to comply with Rule 23 of the Federal Rules of Civil Procedure. *See* Appendix B to *Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 748-50 (6th Cir. 1972).

[14] The Court of Appeals found that this Court had used a flexible racial ratio as a guide and that such a guide had been approved by the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). Although the HEW plan was "somewhat less stringent" than the plan proposed by the plaintiffs, the Court of Appeals held that the Court's approval was within judicial discretion and had, following the mandate of *Green* v. *County School Bd. of Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), the promise of effectively dismantling the previously dual system. *Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 743, 746 (6th Cir. 1972). In regard to defendants' contentions that the proposed plan would work undue hardships on the children of this county, the Court of Appeals noted that such concerns had not properly been presented to the district court and were, therefore, not cognizable on appeal. Similarly, the Court of Appeals stressed the fact that the district court would be open to motions for modification by plaintiffs if there were adverse effects on black children who were, according to plaintiffs, made to bear the brunt of the busing burden. The HEW plan, as accepted, paralleled the *Swann* plan, and the incorporation of any disparate burden on black children into that plan was not addressed by the *Swann* Court.

III. SUMMARY OF ACTIONS TAKEN BY THE COURT AND THE PARTIES SINCE THE 1971 COURT ORDER

Although little action having a signficant impact on the school system was taken by this Court between the 1971 order and 1979, the parties filed myriad motions, reports, and letters, many of which were not acted upon during the eight-year period. A recounting of pleadings and other communications filed with the Court during these years will help to put the progress of and problems with school desegregation in this county into better perspective.

The first report by defendants was filed with this Court on October 19, 1971, and described the first month of operation under the plan. Two days later, plaintiffs moved to join as parties defendant the Metropolitan Government, the Metropolitan Mayor, and the members of the Metropolitan Council since they controlled the purse strings from which money for increased transportation must come.

Defendants' second report to the Court was filed on March 17, 1971, which proposed the attendance zone and other plans for a new comprehensive high school in the Joelton-Whites Creek area, which would be close to the proposed inner loop in the northeastern part of the county and which the Court in the 1971 order had indicated it would approve when plans were finalized. Additionally, the report proposed capital improvements for schools whose student composition was at least 15 percent black. No action was ever taken on the proposals included in this report.

Three months later, the defendant Board of Education filed a petition, seeking changes in the plan in regard to elementary and junior high school zones and the approval of the use of an annex for an overcrowded school in the southeastern portion of the county unaffected by the Court's busing order. Plaintiffs

responded by generally objecting to the proposed changes and requesting changes in the plan as adopted, in that it called for the closure of certain inner city black schools and clustering patterns that required more cross-busing of black children than whites.

A hearing was held pursuant to the motions filed and, by order and memorandum, issued August 17, 1972, and August 19, 1972, respectively, the Court granted plaintiffs' motion to add the additional parties defendant, approved the requested changes in the elementary school zones, but denied the defendants' proposed changes in three junior high schools that would have resulted in lessened degrees of desegregation in those schools. The Court also ordered that the Board purchase additional buses, report to the Court regarding costs of transportation, and close all schools not later than 4 p.m. each day. Further, the Court issued a temporary restraining order against the newly added defendants (council members and mayor) from interfering with the Court's order to desegregate. No action was taken by this Court on plaintiffs' concerns about the alleged disparate transportation burden on black children.

With the third district judge sitting on this case since its inception,[13] the Court held a hearing on the Board's report submitted pursuant to the Court's last order and, by order of August 31, 1972, approved that report and dissolved the injunction against the newly added defendants. Shortly thereafter, the defendant Board sought modification of the August 17, 1972, order prohibiting school closure not later than 4 p.m., which this Court granted on September 11, 1972.

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[13] When this case was first instituted and after the three-judge court was dissolved, *see* text accompanying note 1 *supra*, it was assigned to Judge William E. Miller. He continued to hear the case throughout the next fourteen years and, when he was elevated to judge of the Court of Appeals for the Sixth Circuit, he issued the memorandum

The final action taken by this Court prior to pretrial matters and the subsequent hearings in the summer of 1979 involved an action brought by three newly added black City Council defendants as third party plaintiffs against the United States, HEW, and federal officials, as third party defendants. The third party plaintiffs sought to enjoin the third party defendants from continuing to withhold federal funds that would be used for transportation expenses which would be incurred in implementing the Court's desegregation order. After holding that the Court had jurisdiction over the third-party defendants except for the United States, *see Kelley* v. *Metropolitan County Bd. of Educ.*, 372 F.Supp. 528 (M.D.Tenn.1973),[14] the Court held that the acts of the third party defendants in refusing to release funds for busing for desegregation purposes pursuant to a recently promulgated policy was illegal. The Court further enjoined the third party defendants from enforcing such an illegal and unconstitutional transportation policy and to act within their discretion upon requests for funds. *See Kelley* v. *Metropolitan County Bd. of Educ.*, 372 F.Supp. 540 (M.D.Tenn.1973).

Several matters were pending before this Court at the time it addressed the third party issues. They were not dealt with by the Court at that time nor has this Court taken any action on them since that time. As discussed *supra*, no action was ever taken in

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and order of 1970 as district judge sitting by designation. After that order, however, the case was reassigned to Judge L. Clure Morton, who retained the case until he recused himself after the defendant Mayor moved for recusal on August 22, 1972. The case was then assigned to Judge Frank Gray, Jr. When I took the bench in August of 1978, the case was then reassigned to me, making the fourth district judge sitting on this case.

[14] On December 13, 1973, the Court also granted the original defendant Board of Education leave to intervene as a third party plaintiff in this third party action.

regard to the report filed by the defendant Board on March 17, 1972, in which the Board sought approval for construction of Whites Creek Comprehensive High School. Since that time, the Whites Creek School has been constructed. The current zones for the school are incorporated into a petition filed by the Board on July 24, 1978, discussed *infra*.

Also pending at the time of this Court's last order was the Petition for Approval of the Long Range Building Program, filed on May 30, 1973.[17] This proposal outlining twenty-six building projects has essentially merged into more recent pleadings that describe future plans in greater detail.[18]

The day after the Petition for Approval of the Long Range Plan was filed, defendant Board filed a petition for approval of portables for use in kindergartens. *See* Exhibit 55. At the time of the 1971 court order, this county had not extensively instituted the systemwide, nonmandatory kindergarten program presently in existence. As discussed above, the 1971 order had specifically prohibited the use of portables for any purpose other than to achieve integration. The Court left the Board's request for portables unanswered, and the Board utilized portables at kindergarten locations beginning in the school year 1973-74.

Over two years elapsed before either party officially filed further pleadings in this case, although counsel for the Board cor-

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[17] Over a year later, on December 27, 1976, plaintiffs responded to this petition by generally denying all allegations.

[18] On the same date that the Petition for Approval of the Long Range Building Program was filed, the Board also filed a motion to produce documents. This motion has little current significance. Discovery matters raised by the parties in this case were disposed of prior to and, in some instances, during the pendency of the recent hearings.

responded by letter to the Court during this period of time.[19] The next official pleading was defendants' motion to amend their previously filed Petition for Approval of the Long Range Building Plan and for further relief, filed October 14, 1976, wherein the defendants specifically described new plans for the proposed Goodlettsville-Madison High School and asked the Court's approval to implement these plans.

The first pleadings filed by plaintiffs since 1972 were the answer to defendants' proposed long range plan and a Petition for Contempt and for Further Relief, both filed on December 27, 1976. Plaintiffs therein moved that defendants be held in contempt for their plan to construct the Goodlettsville-Madison High School,[20] the expansion of Hillsboro, Overton, Hillwood,

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[19] Counsel for the Board filed two letters unreported on the Court's docket sheet. The first was filed on August 15, 1973, and relayed the Board's decision to proceed with the plan for using portables at kindergarten sites. *See* Exhibit 55. On October 19, 1973, counsel filed a letter requesting a speedy resolution of the Petition for Approval of the Long Range Building Plan incorporated into the petition filed on May 30, 1973. *See* defendants' memorandum for status conference, filed March 29, 1979. In addition to a relatively insignificant letter filed on November 28, 1973, counsel also filed letters on July 15, 1974, *see* Exhibits 27, 39, and March 14, 1975, *see* Exhibit 37. The 1974 letter informed the Court of the Board's plan to seek funding for high schools that would, beginning in 1978-79, offer comprehensive programs. Included in this plan were the Whites Creek High School and the proposed Goodlettsville-Madison High School. Also listed in the letter were elementary schools that were part of the longrange building plan. In the 1975 letter, counsel related the projected enrollment percentages for Hillwood, Hillsboro, and Stratford, as expanded comprehensive high schools, and informed the Court that funding for vocational facilities at these schools would be sought.

[20] Defendants had described this plan in their motion to amend, filed October 14, 1976, discussed *supra*. The 1971 Court order had specifically enjoined the construction of the Goodlettsville-Madison High School, as proposed at that time since, because of its location in the white suburbs and away from the imaginary inner loop divider, it would tend to promote segregation. Since the 1971 order, however, the defendant Board had changed the proposed site location for the school from the city limits of the surburban City of Goodlettsville to a location nearer to the inner loop extended.

Glencliff, Stratford, and Maplewood High Schools into comprehensive high schools,[21] the construction of Whites Creek Comprehensive High School,[22] the establishment of the Cole Elementary School annex,[23] and, finally, the proposed closure of Pearl High School, the only traditionally black high school located in the inner city.[24]

Plaintiffs also sought alterations in the Court's 1971 order, stressing, as they had before and after the 1971 order, the disparate busing burden placed on black children.[25] According to the plan and the Board's implementation of it in the last nine years, black children are bused out of the inner city to schools in

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[21] Requests for expansion of Hillsboro High School, implicitly disapproved by the Court in the 1974 order when it denied defendants' application to acquire additional property for expansion to a comprehensive high school, had been reiterated in defendants' Petition for Approval of the Long Range Plan of May 30, 1973, and in counsel's letters of July 15, 1974, and March 14, 1975. Also included in these communications were explanations of expansion of other comprehensive high schools, listed above.

[22] Such construction had been proposed in defendants' petitions to the Court, filed March 17, 1972, and May 30, 1973, and again in counsel's letter to the Court of July 15, 1974.

[23] As reported to the Court on July 15, 1976, the Board reopened Turner School to serve as an annex for the fifth and sixth grades at Cole for the year 1976-77. Cole is located in the southeastern part of the county, outside the "court-ordered" area, whereas Turner is located further in toward the center of the city in the "court-ordered" area.

[24] By the time this case was heard in July of 1979, the Board had rejected the plan, as submitted by the staff, to close Pearl.

[25] In addition to raising this issue on appeal, plaintiffs addressed this concern in their response of August 14, 1972, to the Board's petition of July 7, 1972. The Court did not deal with this issue in its order and memorandum opinion, issued August 17, 1972, and August 19, 1972, respectively.

predominantly white neighborhoods for grades one through four, whereas white children are bused into the inner city to attend formerly predominantly black schools in grades four and five.

Plaintiffs further requested that the 1971 order be modified to include a requirement that defendants recruit, employ, and assign black personnel commensurate with the ratio of the black students in the school system. Finally, plaintiffs asked the Court to change the 1971 order to incorporate a plan to upgrade Pearl High School and other inner city schools.

In plaintiffs' petition for contempt and further relief, they additionally asked the Court to award attorneys' fees. They had previously requested attorneys' fees in motions dated February 8, 1974, and April 11, 1975, as well as in a motion, filed October 16, 1975, to dispose of the pending motions for attorneys' fees.

The next formal pleading was filed in this Court by defendant Board nearly two years later. In its Petition for Approval of School Attendance Zones for 1978-79, filed on July 24, 1978, and amended on August 18, 1978, the Board asked that the Court accept new zoning plans, grade structures, and feeder patterns.[26] Plaintiffs responded to defendants' request, but no action was taken by this Court.

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[26] The petition detailed the zone lines for Hillwood, Hillsboro, Overton, Maplewood, Glencliff, Stratford, and Whites Creek as comprehensive high schools serving grades nine through twelve, the addition of grade nine to McGavock, the county's first comprehensive high school constructed under the mandate of the 1973 Vocational Education Act, T.C.A. §§ 49-2709 *et seq.*, and the addition of grade nine to Cohn High School, the only naturally integrated inner city school, and to Pearl High School, the only remaining traditionally black inner city high school. Additionally, changes were reported for junior high and elementary schools, primarily affecting feeder patterns, decreasing overcrowding, and eliminating one grade schools.

The final pleading filed in this case prior to the 1979 pretrial matters was plaintiffs' amendment to the October 14, 1976, Petition for Contempt and for Further Relief, filed on August 28, 1978. Basically, the amended petition reiterates the concerns stated in plaintiffs' earlier petition although in addition it responded to defendants' July 24, 1978, petition.

IV. THE 1979 COURT ORDER

In the spring of 1979, this Court held a pretrial conference to distill the remaining issues, some of which had obviously laid dormant for years, and to organize the progression of the case. In an effort to simplify the future presentation of the case, the Court divided the pending matters into four phases, which would be heard seriatim: (1) Historical recapitulation of school desegregation in this county since 1971, and consideration of the Board's Long Range Plan, including requests for construction projects; (2) Matters relating to the racial composition of staff and faculty; (3) Plaintiffs' petitions for contempt; and (4) Plaintiffs' petitions for attorneys' fees.

Hearings on Phase I were held in June and July of 1979, at the conclusion of which the Court ordered that the defendant Board devise and submit to the Court a new plan for desegregation that would involve the entire metropolitan county rather than exempt the outer reaches as the 1971 order had done. *Kelley* v. *Metropolitan County Bd. of Educ.*, 479 F.Supp. 120 (M.D.Tenn.1979).[27] Because of the short time involved before the beginning of the school year 1979-80, however, the Court approved the zones already in effect for 1979-80, and allowed the Board an additional year before implementation of a countywide plan.

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[27] The Court encouraged creativity and innovation in the development of a new plan by stressing that the Board should "assum[e] no parameters heretofore ordered by the Court." *Id.* at 122. The Court instructed the Board, in developing the plan, to consider the max-

Because the Vocational Education Act, T.C.A. §§ 49-2709 *et seq.*, mandated that each school system provide children with an opportunity to attend a comprehensive high school, those children zoned to a noncomprehensive high school in this county had been allowed to transfer automatically to a comprehensive high school. At the 1979 hearings, it became apparent that white children zoned to Pearl High School in the inner city had used this opportunity to defeat the desegregation efforts at that school, leaving Pearl 96.6 percent black in the school year 1978-79. The Court, therefore, enjoined the Board from further implementation of the automatic transfer policy, ordered it to review all transfer requests, and grant such transfers only for bona fide program reasons. Such an injunction was issued orally from the bench on July 2, 1979, before the conclusion of the hearings.

On August 7, 1979, subsequent to the issuance of that injunction and the already concluded hearings, plaintiffs filed a petition for contempt, charging that the Board had not complied with the July 2 order. Hearings were held during August of 1979 on plaintiffs' motion for contempt. The Court found that the procedure used by the Board in approving subject-matter transfers had "a negative impact upon the desegregation efforts of the School Board" and violated the spirit of the Court's 1971 order as well as the July 2, 1979, order. 479 F.Supp. at 129. The

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imum utilization of existing buildings, especially those in the inner city, the economic factors of transportation costs and fuel economy, the time and distance involved in transportation, and any other factors that would "impact upon the ultimate objective of a quality educational opportunity for all children in Davidson County through a unitary school system." *Id.* In so instructing, the Court attempted to stress that the goal of the school system and the Court, in its intervention into the operation of that system, should be to insure the opportunity for quality education and that any desegregation remedy should be viewed as a means toward that end rather than an end in itself.

Court, therefore, specifically defined the procedure by which requests for subject-matter transfers should be considered. *Id.* at 124-30. Pursuant to defendants' motion filed after the hearings, the Court permitted the Board to grant any transfer requests of any senior who asked to transfer from a school to which he was zoned to the high school he attended as a junior in the previous year. *Id.* at 131-32.

V. DEVELOPMENTS SINCE THE AUGUST 1979 COURT ORDER[28]

In response to the August 27, 1979, Court order, the defendant Board began meeting on October 29, 1979, to develop a countywide desegregation plan. In compliance with the Court's suggestion that the Board encourage and consider community input,[29] the Board established a citizens' advisory panel whose members sat with the Board in its deliberations on the plan. Each of the nine Board members, three of whom were black, chose one citizen representative.[30] Five public hearings were held in November of 1979, at which time suggestions from

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[28] Due to the length and complexity of this memorandum opinion, the findings of fact and conclusions of law have not been stated separately, but this entire memorandum opinion shall constitute findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

[29] The Court noted that the significance of an difficulties in achieving a unitary school system mandate that "the best minds available to the parties, including input from the many well-motivated, thoughtful citizens of the community, should be sought and received." *Kelley* v. *Metropolitan County Bd. of Educ.*, 479 F.Supp. 120, 123 (M.D.Tenn. 1979).

[30] In addition, a white interim Board member previously apointed to fill a vacancy continued to sit with the Board as a citizen representative, although his permanent replacement had already been designated and actively participated in the deliberations.

citizens were sought in an effort to develop criteria upon which to base a plan. After the public hearings, the Board and Citizens' Advisory Panel met five times in December of 1979, to develop criteria for the plan.[31]

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[31] The Board adopted the following twelve criteria that should be utilized in the development of the plan:

1. That all schools in the county would be involved in the unitary school plan;

2. That a four-tiered system of grades be adopted, which would consist of 1-4, 5-6, 7-8, and 9-12 as nearly as possible;

3. That a child would not go to more than four schools during his experience, if his residence did not change;

4. That feeder patterns of elementary to middle to high school be established which would allow as many students as possible to remain together for as long as possible;

5. That the goal of this plan be that each school have an optimum of 32 percent black students with a 20 percent range on either side of optimum (12 percent black to 52 percent black);

6. That the goal of the plan be the establishment of a magnet program in any secondary school in which the white minority enrollment is between 10 percent and 20 percent;

7. That, wherever possible, school zones that are integrated by at least 32 percent minority (black or white) without busing for racial balance should be established;

8. That the goal of the plan be to distribute the burden of busing as equitably as possible;

9. That the planners be directed to consider all existing buildings, full utilization of presently used buildings based on projected enrollment, the option of reopening buildings not now in use, expansion of these buildings, and the possible addition of new buildings which will facilitate the conservation of time, distance and fuel and which will facilitate the other major criteria of the plan;

10. That priority consideration be given to the utilization of existing facilities prior to recommendations for construction of new buildings;

11. That the average bus ride, one way, be kept to 30 minutes and no route will be longer than 80 minutes (the longest route at the present time under the present plan);

During these December meetings, the Board voted to retain three outside consultants who had expertise in the area of school desegregation.[32] A planning team was formed, composed of the three consultants, the Assistant Superintendent for Facilities and Services, the Director of Zoning for the school system, eight principals currently employed by the school system, and two administrative employees of the Board's central office.[33] Input was also received from other experts in the field who had either worked with school systems under desegregation orders or who had academic expertise in this area.[34]

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12. That no first and second grade students be required to ride buses more than 30 minutes one way unless it is to the nearest school. *See* Collective Exhibit 154, at 479-80, 483-84, 529, 568.

[32] The three outside consultants hired by the Board were Dr. Donald Waldrip, former Superintendent of the Cincinnati Public School System, former Assistant Superintendent of the Dallas School System, private consultant to various school districts on their desegregation plans, and an authority on magnet schools; Dr. Everett Myer, Assistant Director, Educational Opportunities Planning Center, University of Tennessee, Knoxville, Tennessee; and Mr. Nathaniel Crippens, retired Associate Director of the Desegregation Assistance Center, University of Tennessee College of Education, Knoxville, Tennessee.

[33] The principals represented elementary, junior high, and high schools, including schools formerly unaffected by the Court order as well as those within the 1971 order. Of the eight principals selected, three were black. Of the two administrative personnel, one was black and one white.

[34] The five experts consulted by the Board and planning team were Dr. Jay Robinson, Superintendent of the Charlotte-Mecklenburg, North Carolina School System; Dr. Robert Crane, Sociologist and Professor at Johns Hopkins University; Dr. James Barnes of the Northeastern Desegregation Center, Hartford, Connecticut; Dr. Vern Cunningham, court-appointed Master of the Columbus, Ohio School System; and Dr. Richard Pride, Associate Professor of Political Science, Vanderbilt University, Nashville, Tennessee, and author of a study on the phenomenon of "white flight" in Louisville, Memphis, and Nashville.

The planning team worked through February 4, 1980, consulting regularly with the Board. The Board met to develop a plan, using the previously established criteria, thirteen times during January and February of 1980, spending over 65 hours on its formulation. Two of these meetings were devoted to public hearings to obtain further community imput. *See* Exhibit 177. In the early morning hours of February 5, 1980, the Board adopted a plan, after spending close to one hundred hours of preparation and deliberation. *See* Exhibit 178.

The plan, thus developed and approved, was submitted to the Court on February 11, 1980. In its regular February 12, 1980, meeting, however, the Board voted to amend the plan. Such amendment was filed with the Court on February 14, 1980, by way of affidavit of counsel for defendant Board. Plaintiffs filed their objections to the Board's proposed plan on February 29, 1980. A diverse group of plaintiff-intervenors,[35] representing schools slated for closure under the Board plan, requested and were granted permission to intervene and filed the rudiments of an alternative plan on February 29, 1980. The intervenors' plan was modified and refined during the course of the hearings and submitted with greater detail in their proposed plan on April 14, 1980.

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[35] The intervenors represented parents and concerned citizens from the following areas:

(1) the Bellevue community, which is a growing, predominantly white area in the southwest portion of the county in which the Board proposes to close Bellevue High School, leaving only a junior high;

(2) the Joelton community, which is a rural, predominantly white area in the northwestern part of the county where the Board proposes to close Joelton High School, leaving it operational as an elementary and junior high;

(3) the inner city, integrated neighborhood surrounding Cohn High School; and

Hearings in this case recommenced on March 3, 1980, and were held for sixteen days in March, nine days in April, and ended with closing arguments on May 1, 1980. During these hearings, testimony was received regarding the plans submitted by both the defendant Board and the intervenors. Before the hearings started, while they were in progress, and even thereafter, the Court received several hundred letters from parents, interested citizens, and community groups, all of which were made a part of the official record in this case. A comparable number of letters was received by the defendant Board. The compendium of such letters to the Board was introduced into the record as Collective Exhibit 170. Amicus curiae briefs were filed by the Metropolitan Nashville Education Association, the League of Women Voters, and the American Education Legal Defense Fund. The three black members of the Board filed a dissent to the plan proposed by the Board and also testified at the hearings. Another white Board member also filed a separate, written dissent from the plan.

During the course of the hearings, the plaintiffs were offered the opportunity to file an alternative plan. This offer was first declined but later accepted by the plaintiffs. The additional time requested in which to develop such a plan, however, appeared to preclude a resolution of the case by the beginning of the school year 1980-81 and, therefore, no such plan was presented. The plaintiffs did, through their expert witness, Dr. Hugh

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(4) the almost totally black neighborhood adjacent to the inner city Pearl High School.

The Court cannot help but be pleasantly surprised as well as exceedingly gratified that citizens from these communities with diverse concerns and needs have bound together in a spirit of cooperation and industry. It is to be hoped that these citizens will continue to work together in the coming years to insure the effectiveness of a unitary school system in this county.

Scott,[36] offer specific objections, recommendations, and suggestions to the Court.

During the pendency of the hearings and thereafter, the Court read all communications from the public and studied in detail the plans proposed by the defendant Board and the intervenors, the objections filed by the plaintiffs, and the concerns and suggestions presented in the amicus briefs. The plans and objections thereto will be described below.

VI. PROPOSED DESEGREGATION PLAN SUBMITTED BY DEFENDANT SCHOOL BOARD

Several basic principles, developed initially by the Board as criteria to be used in formulating the plan, *see* note 31 *supra*, are woven into the plan as finally adopted and submitted to the Court although rigid adherence to these goals was apparently not always possible. The Board determined that a four-tiered grade structure was the most conducive to integration efforts and that such grade structures would, when feasible, consist of grades 1-4, 5-6, 7-8, and 9-12. The Board adjusted the previous range of percentage of black students per school from 15-35 percent, as adopted by the Court in 1971, to an optimum of 32 percent black with a range of 20 percent in either direction, thus allowing a given school to have only 12 percent black or as much as 52 percent black. The Board focused on the concern of lengthy bus rides by setting a limit of 80 minutes for the longest one-way bus ride[37] and 30 minutes for first and second graders unless a longer ride is necessary to reach the nearest school.

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[36] Dr. Scott is presently Dean for Programs in Education and Professor of Education at Hunter College of the City University of New York. He has been a professor of education at Howard University, Superintendent of Schools for the Public Schools of the District of Columbia, Region Assistant Superintendent fro the Detroit Public Schools, and has published numerous articles relating to education.

[37] Some white children are presently bused 80 minutes for nonintegration purposes to attend the nearest school.

A. Senior High School Plan

The Board plan provides for the retention of the eight existing comprehensive high schools to serve grades 9-12, and the immediate closure of only two of the nine traditional high schools. Joelton High School, in the northwest portion of the county previously unaffected by the Court order, and Bellevue High School, in the southwestern corner of the county, also outside of the Court order, are slated to be closed as high schools but retained as junior highs. The Board proposes to maintain Hume Fogg High School, located in downtown Nashville, as an open-zoned, vocational-educational school for grades 10-12. West End Junior High School would be converted into an open-zoned, magnet school for the academically gifted and would serve grades 7-8 the first year, with one grade per year being added thereafter. In addition to Hume Fogg, only two schools will be limited to grades 10-12. The Board recommends a gradual phasing out of Pearl High School, discussed *infra*. Because of the building capacity of DuPont High School, it is not possible to accommodate ninth graders there using the present zone. With these exceptions, all other comprehensive and traditional high schools would serve grades 9-12.

The Board proposed two alternative plans regarding the two existing inner city high schools. The primary plan calls for the construction of a new inner city, comprehensive high school in a contiguous zone around the present Cohn and Pearl High Schools but somewhat smaller than the existing zones for the two schools.[31] In the meantime, the Board suggests that those students who have been attending Pearl, Cohn, and Hillwood, a comprehensive high school located in a white neighborhood

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[31] Although the Board has not chosen a specific site for Pearl-Cohn, the staff has studied the possibility of using the site of the present Cockrill Elementary School, located close to the current Cohn building.

southwest of the inner city to which students from the inner city have been bused, remain at those schools. Those children who, under the old plan, would have entered either Pearl or Cohn beginning in the ninth grade would be zoned to Cohn, resulting in a gradual phasing out of Pearl. Since no students outside of the inner city would be zoned to Pearl during the three year phasing out period, it would be overwhelmingly black. In fact, the Board projects that Pearl's student population would be 92 percent black in the year 1980-81. Cohn, on the other hand, would be within the 12-52 percent range approved by the Board. In contrast, Antioch, located in the southeastern part of the county in a predominantly white neighborhood and slated to receive some students formerly zoned to Pearl, would have students formerly zoned to Pearl, would have a projected black attendance of only 5 percent. Once Pearl is phased out, however, black students in the noncontiguous, former Pearl zone would be zoned to Antioch, raising the percentage to 18 beginning in the 1983-84 school year.

The Board outlined an alternative plan encompassing the inner city high schools in the event the Court did not accept the above-described plan. This alternative plan entailed the closure of both Pearl and Cohn as regular high schools and the rezoning of students now zoned to Pearl and Cohn (except for those students in the present Pearl zone who would attend Antioch) to Hillwood and Hillsboro, both comprehensive high schools located in predominantly white neighborhoods.

The second and final proposal for high school construction involves a new Goodlettsville-Madison-Trinity Hills Comprehensive High School, the plan for which the Board has essentially been seeking approval from the Court since 1972. The present Goodlettsville and Madison High Schools would be closed but retained as junior high schools. Students from northwest

Nashville living southwest of Maplewood High School would be bused to the Goodlettsville-Madison High School, giving it a racial ratio within the approved range. Additionally, Stratford Comprehensive High School, whose zone would be contiguous to the zone for the proposed new school, would be within the approved range without pairing with a non-contiguous neighborhood. In contrast, Maplewood and Whites Creek Comprehensive High Schools, also contiguous to the proposed zone for Goodlettsville-Madison, would have a racial ratio of 54 and 58 percent black, respectively, both slightly above the approved range.

The original Board plan contemplated the closure of East High School, located in what is called East Nashville north of the Cumberland River. The Board on February 12, 1980, however, amended the plan to study the feasibility of leaving East open beyond 1983 and revising the previously adopted zone for the new Goodlettsville-Madison Comprehensive High School. It is projected that East would have a student population consisting of 55 percent black students, a ratio slightly over the approved range. With the exception of East, Maplewood, Whites Creek High Schools, and Antioch for the interim period, all other comprehensive and traditional high schools in the county would have racial ratios within the approved range.

During the period of construction of the new Goodlettsville-Madison High School, the Board suggested that inner city students be bused to both Goodlettsville and Madison, giving each of these schools a 12 percent black population. In the event that the Court disapproved of the construction of the Goodlettsville-Madison High School, the Board adopted an alternative plan that would convert Goodlettsville High School to a junior high school, serving grades 7-9 from the present

Goodlettsville and Maplewood zones and altering the Maplewood grade structure from its present 9-12 tier to a 10-12 school. Under this plan, both Maplewood and Goodlettsville would have racial ratios within the approved range. The same noncontiguous zone as established for the primary interim plan would be assigned to Madison, making it 12 percent black.

B. Junior High School Plan

With the exception of DuPont Junior High School, the Board proposed that all junior high schools house grades seven and eight. Because DuPont Senior High cannot accommodate grades 9-12, the Board suggested that DuPont Junior High serve grades 7-9, including the middle portion of the area otherwise zoned to Donelson that consists of children who would be bused to DuPont for ninth grade.

As previously discussed, Bellevue and Joelton Senior High Schools would be retained only as junior highs. The Board plan included five noncontiguous zones from which children living in the inner city and in northeast Nashville would be bused to integrate Bellevue, Donelson, Apollo, Goodlettsville, and Neely's Bend Junior High Schools, all of which are suburban, predominantly white schools. In addition, the predominantly white suburban children in the Antioch zone in the southeastern portion of the county would be zoned to Cameron Junior High School, located in the inner city. By expanding and annexing the nearby Johnson Elementary School, previously closed by the Board, Cameron would become one of two middle schools serving grades 5-8. The fifth and sixth graders would be bused into the Cameron Complex from the same zone as the seventh and eighth graders. The second middle school serving grades 5-8 would be the Donelson Complex, located in the eastern part of the county. It would be comprised of the present Donelson Junior High School and the nearby Donelson Elementary School and would receive the same children from the northeastern part of the inner city in all four grades.

C. Elementary Schools

As discussed above, the Board developed a two-tiered elementary structure of schools housing grades 1-4 and 5-6. There are, however, many variations in this formula in the final plan due primarily to transportation distances and degrees of natural neighborhood integration surrounding existing elementary schools. Three schools in East Nashville north of the Cumberland River are scheduled to serve grades 1-6 from the integrated neighborhoods surrounding them.[39]

In addition, a fourth school would be retained as a 1-6 school. The Board's criterion that no student should be bused for more than 80 minutes except to the nearest school precluded the Board from attempting to integrate Harpeth Valley Elementary School, located in the suburban, predominantly white southwestern portion of the county. The Board had initially assigned these 42 children to an inner city school but later altered that assignment due to the travel distance involved. Harpeth Valley would thus remain overwhelmingly white.

Similarly, the Board's criterion precluding busing for first and second graders for more than 30 minutes except to the nearest school affected inner city children who normally would have been bused to one of three 1-4 centers in the eastern part of the county. The Board, therefore, proposed to give these children a choice between attending Buena Vista, located on the edge of a zone contiguous to theirs, or one of the three schools to the east. They would then attend Jackson, Hermitage, or Dodson Elementary School in the Donelson cluster for grades three and four and the Donelson Complex for middle school in grades five through eight.

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[39] These three schools are Cotton, Howe, and Ross, contiguous to each other and located in the East and Stratford High School zones. It is extremely disheartening that only three schools in the county can boast of integrated neighborhoods from which the children can attend true neighborhood schools in an integrated setting without the necessity of noncontiguous busing or clustering of schools.

The thirty minute limit on busing for young children also motivated the Board to reconsider the pairing of those children in East Nashville, just north of the Cumberland River, with the three elementary schools in the Neely's Bend area to the northeast. These inner city children near Caldwell Elementary School would have to travel more than thirty minutes to attend the Neely's Bend area schools and vice versa. The Board, therefore, devised a meeting place for these children at Baxter School, located to the northeast of the inner city. Travel distances for the inner city and the more suburban children would be comparable. After attending Baxter, the inner city children would then be bused to one of three 3-6 centers in the Neely's Bend area. The Neely's Bend children would be bused to Baxter for grades one and two but would return to their neighborhood schools for grades 3-6.

The Board developed eleven clusters in which the children would not have to be bused to schools in noncontiguous zones. By drawing zoning lines to take into account the racial makeup of populations within the clusters and pairing schools within the clusters, the Board provided these children the opportunity to stay within their cluster for their entire elementary educational experience. Two clusters out of the eleven, however, are unique. The fifth and sixth graders from the northernmost portion of the Crieve Hall cluster, a somewhat triangular zone in the south central part of the county, are zoned to Binkley School, a 5-6 center in the contiguous cluster to the southeast, rather than to Crieve Hall, located in their cluster slightly to the southwest of Binkley.

Several clusters form irregular triangles emanating from the center of the county with broadening bases at the county lines. For the most part, the schools toward the inner city are 5-6 centers and the more suburban schools are designated as K-4 centers. This pattern is reflected in five of the seven clusters forming irregular triangles. In three of the elementary clusters the

schools are located or zone lines drawn so that the pattern described above is inapplicable.

Because of the lack of neighborhood integration, the Board determined that six clusters had to be paired with six other noncontiguous clusters and thus busing across other zones would be necessary. Inner city children surrounding Cameron Junior High in an irregular triangular zone cut out from the Napier cluster would be paired with an irregular circular zone in the far southeastern part of the county. These inner city children would be bused out to the suburban schools for grades 1-4, whereas the suburban children would be bused in to Cameron for grades 5-8. Similarly, inner city children in the north Nashville Wharton zone would be bused to suburban schools in the southwestern part of the county for grades 1-4, and the suburban children would be bused to Wharton for fifth and sixth grades.

The same pattern applied in the zone for children in northeast Nashville around Haynes School who would be zoned to one of three 1-4 centers in the northeastern part of the county, and the fifth and sixth grade children in the Amqui zone who would, in turn, be bused into the city to Haynes. Again, the pattern repeated itself for those children in the zone north of but contiguous to the Haynes zone. They would be bused north to Union Hill or Goodlettsville for grades 1-4, and the suburban children bused in to Brick Church for fifth and sixth grades. Predictably, the children in grades 1-4 in the inner city zone around Buena Vista would be zoned to either McGavock or Hickman to the east and the more suburban children bused in to Buena Vista for grades five and six. The two pairings of the noncontiguous zones in the suburban Neely's Bend area with inner city Caldwell, and the inner city North Nashville zone with the Donelson zone have already been discussed.

Only one pairing deviated from the pattern of busing inner city children to more suburban schools in grades 1-4 and suburban

children into the city for grades five and six. In the zone north of the Cumberland River containing Shwab, Joy, and GraMar, children would remain in that cluster, attending Joy for grades one and two and either Gra-Mar or Shwab for grades 3-6, whereas the children in the zone slightly to the northeast attend Bellshire for grades 3-6 but are bused in toward the city to attend Joy for grades one and two.

Although the Board has adopted a plan to convert West End Junior High to a junior and senior high magnet, with the alternative plan for Pearl to be converted into a magnet, the Board has not chosen which, if any, elementary schools would become magnets. The planners, however, have recommended that five elementary schools be made magnets, feeding into the secondary magnet. This recommendation includes Stateland, located in the Donelson cluster in the eastern part of the county and formerly used as an annex for Dodson School; Dan Mills, located in the Inglewood cluster to the northeast of the inner city; Burton, located in the Stokes cluster in the southern suburban area of the county; Parmer, also in the Stokes cluster toward the southwestern part of the county; and Ford Greene, in the inner city in the Head cluster.

Under the Board's plan, nine elementary schools would be closed for all purposes. Three of these schools are in the inner city whereas the other five are located in more suburban areas to the southwest and southeast of the inner city.

The Board projected that in 1980, under its proposed plan, 87 percent of all elementary school students would attend schools within the approved racial ratio range of 12 to 52 percent black. With the exception of DuPont and Harpeth Valley Elementary, all of the twelve elementary schools whose racial ratios fall outside the approved range are located north of the Cumberland River. In these ten schools, the percentage of blacks is projected to exceed 52 percent. This deviation can be explained by the fact

that the black population is most concentrated north of the river where blacks make up 40 percent of the population whereas throughout the county blacks comprise only 32 percent. The largest percentage of blacks attending elementary schools would, however, only be 63 percent, which is projected for three elementary schools.

VII. PLAINTIFFS' OBJECTIONS TO THE BOARD PLAN

As noted above, plaintiffs did not propose a plan as such. However, very specific objections were made and specific recommendations were offered through plaintiffs' pleadings and witnesses.

A. Disparate Burden

Plaintiffs' major complaint to the 1971 plan and to that of the Board now under consideration is the disparate burden each places upon young black children. Both plans are premised upon the "busing out" of black children in grades 1-4, and the "busing in" of white children in grades 5-6. Plaintiffs insist that such a premise places all of the burden of the desegregative effort upon the young black child while permitting the young white child to attend a neighborhood school. They postulate that the early primary grades are the most formative years of a child's educational experience. Continuity is extremely important during these years. The ability of a kindergarten teacher to discuss a child's problems and progress with a first grade teacher, and the first grade teacher with the second, is important educationally to both white and black children, but even more so to the child from a socioeconomically deprived background in which parental support may not be as present. Plaintiffs point out that under the proposed plan, as well as under the 1971 order, the inner city black child never goes to the same school for first grade as he does for kindergarten.

Another claimed damaging impact on young black children in the plan is that, in most instances, the black children are taken from a familiar, friendly, supportive environment into what can often be a hostile and unfamiliar environment. This is asserted to be particularly harmful to black children from an underprivileged socioeconomic status. Once again, it is also harmful to white children, but not as severe in higher socioeconomic families.

A third problem cited by plaintiffs with the transportation of young black children away from their familiar environment in the early grades is the inability to have parental contact and input. Parents of lower socioeconomic status are much less likely to have linkage with the teacher, particularly when the assigned school is in a distant suburb inaccessible by public transportation.

B. Educational Unsoundness of the Four-Tiered Structure

Under the proposed Board plan as well as under the present 1971 order, most children will go to at least four schools during their K-12 school experience and almost all black children will go to five schools. Not only plaintiffs' experts, but also all those who testified for intervenors as well as the Board, assert that a three-tiered structure is far more educationally sound. In its admission of this principle, the Board acknowledged that its use of a four-tiered structure plus kindergarten was chosen to facilitate the achievement of desired racial ratios.

C. Closure of Inner City Schools

The Board plan proposes to close five more elementary schools in or on the edge of predominantly black areas. In addition, under the various alternatives of the plan, Pearl High School is contemplated for either closure or conversion to a

magnet school. Pearl is the only remaining historically black high school. Plaintiffs argue persuasively for the retention of Pearl because of its historic contribution to the black community of Nashville, the contribution of its graduates to the nation, its value as a source of ethnic pride and symbol of black achievement, and the fact that it is a sound structure, aesthetically attractive, and functional. The building was designed by black architects, constructed by black contractors, and has graduated black persons who have gone on to great achievements in the region and the nation. Such role models are of significant importance to young black children seeking to break out of the bonds of poverty and overcome the unfortunately still-present effects of our shameful two-hundred-year history of discrimination against the black citizens of this land. Substantial proof from many prominent black leaders was offered in support of these contentions.

D. The Rightness of Whiteness or "Osmosis" Effect

The Board plan and the 1971 plan are both premised upon a goal that the percentage of black students in each school represent the percentage of blacks in the county. This is justified upon the philosophy that each public school should be a microcosm of the community it serves and that it is necessary to use such a percentage mix in order to have enough blacks "to spread around," thereby achieving racial balance in all schools, and upon the now questioned sociological studies that attempted to demonstrate an educational osmosis effect on a black child from being in a majority white school setting. Plaintiffs insist: (1) the microcosm effect is practically impossible; (2) the "spreading around" effect is inherently disparately burdensome to blacks; and (3) the osmosis theory is invidiously racist and based upon assumed black inferiority. Plaintiffs assert that to contend that a black child can receive a quality education only

in a white majority classroom is blatantly racist and paternalistic. In addition, because the earlier sociological studies that may have indicated an osmosis effect have been subjected to such serious methodological question, and because more recent studies have indicated the incorrectness of the earlier conclusions, they should be disregarded.

This point of departure demonstrates the evolution of desegregation philosophy that has occurred among educators, sociologists, black parents, and plaintiffs in this litigation as well as in similar litigation across the country. Historically, black plaintiffs felt the necessity to be in a majority white school in order to be assured of equal distribution of educational funding. The assertion and recognition of the right to equal protection of the laws has rendered this reason irrelevant in today's climate. A dramatic role reversal has taken place. In this case, we have a white majority of the school board, acting on the advice of a white desegregation expert, recommending to the Court *more* busing to achieve *more* racial balance. Equally contrary to earlier posture, the black plaintiffs urge upon the Court *less* busing, *more* neighborhood characteristics to the assignment plan, and the permissibility of majority black schools.

Based upon these and other criticisms of the Board plan, the plaintiffs recommend specific features which any revisions should incorporate:

1. An intervention program that addresses the needs of students who are deficient in the basic skills, especially when such students are bused to schools not in their immediate neighborhood;

2. A program at all schools that provides relevant educational experiences geared to helping students acquire an understanding of the life and culture of black Americans;

3. Programs and services that address the needs of students, black and white, who are achieving below the national norms in the basic skill areas;

4. A mechanism that insures that black students do indeed gain equitable access to the specialized programs offered in the comprehensive high schools;

5. A commitment to the maintenance of Pearl High School;

6. The concept that either whites or blacks can constitute the minority racial group;

7. The maintenance of the kindergarten and the primary grades as an integral educational unit;

8. A busing formula that does not shift black students in disproportionate numbers to white students;

9. A commitment not to dislocate black students disproportionately in the kindergarten and early grades;

10. An improved systemwide ratio of black teachers and black administrators;

11. A policy that permits a greater number of black teachers to be assigned to predominantly black schools.

VIII. THE INTERVENORS' PLAN

The plan submitted by the intervenors was hurriedly prepared and therefore understandably lacks refinement in some of its details. It consists of a three-tiered structure within six geographical clusters of elementary, middle schools, and high schools. The elementary schools are neighborhood in character and admittedly do not make maximum utilization of buildings, nor have the neighborhood lines been drawn with a view to maximize integration possibilities within the neighborhood concept. The range of black-white student population ratios for elementary schools within the various clusters are:

E Cluster—from 100 percent white at Union Hill to 99 percent black at Kings Lane

Q Cluster—from 94.4 percent white at Stratton to 82.7 percent black at Glenn

U Cluster—from 99.4 white at Stanford to 88.8 percent black at Caldwell

I Cluster—from 97.2 percent white at Berry to 86.7 percent black at Napier

T Cluster—from 98.7 percent white at Crieve Hall to 98.3 percent black at Ford Greene

Y Cluster—from 98 percent white at Harpeth Valley to 99.2 percent black at McKissack

(Exhibit 227). The elementary student assignment plan did not consider kindergarten, or special education students, or building requirements. (Exhibit 179).

The middle schools within each cluster join a number of the elementary schools to feed each middle school. No noncontiguous zones are utilized to achieve greater degrees of integration. The ranges of black-white student populations are:

E Cluster—from 97.4 percent white at Goodlettsville to 70.8 percent black at Ewing Park.

Q Cluster—from 94.4 percent white at Neely's Bend to 56.7 percent white at Highland Heights.

U Cluster—from 99.1 percent white at Two Rivers to 64.2 percent black at Meigs

2I Cluster—from 94.6 percent white at Apollo to 80 percent black at Cameron

T Cluster—from 91.7 percent white at McMurray to 95.6 percent black at Wharton

Y Cluster—from 95.7 percent white at Bellevue to 42.7 percent black at West End

(Exhibit 227).

The high school plan envisions retention of the existing comprehensive high schools, but also would retain Pearl, Cohn, Bellevue, Joelton, Antioch, East, DuPont, Madison, and Goodlettsville as "traditional" high schools. An option would be offered to each student within each cluster of either a comprehensive or traditional secondary education.

The plan contains a number of voluntary components designed to foster community support and also to facilitate integration. Failure to achieve or maintain at least a 10 percent racial minority presence (black or white) within a reasonable time after use of magnet programs and zone readjustments would result in closure of the school. If a school fell below 50 percent utilization it would be closed. Application for transfer from a "traditional" to a comprehensive high school which would have a negative impact on integration would be first subjected to a course offering at the "traditional" school to attempt to prevent the transfer.

The intervenors' plan emphasizes the use of public transportation facilities as both a money-saving device and as a method for establishing natural linkages among students, parents, and the receiving schools. The point is well made that access to a school by public transportation tends to foster parent participation in school activities and in the education of their children, facilitate the participation of children in afterschool extracurricular activities, and encourage intercommunity relationships. As noted in the discussion of the Board's plan, noncontiguous zoning between communities, between which there is no public

transporation and little other commonality, has many inherent problems and disadvantages. Close coordination between the Board and the Metropolitan Transit Authority is urged in establishing new routes and future school construction.

The high school plan departs from a consistent feeder pattern for the middle schools. For example, some children who went to middle school at John T. Moore in the "T" cluster will go to high school in the "Y" cluster. Some who went to West End in the "Y" cluster will go to high school in the "T" cluster. Litton middle schoolers will be split between the "Q" and "U" clusters. (Exhibits 225 and 226).

The intervenors urge the Court to defer adoption of any plan until 1981—82 in order to implement their suggestion.

Although the voluntary components of the plan offer attractive alternatives designed to foster community support for the school system, the plan is defective in a number of respects.

First, it emanates largely from a parochial desire to maintain high schools in established communities such as Pearl, Cohn, Bellevue, and Joelton in contratiction to the Board's established policy (and state mandate) of a system of comprehensive high schools. There is a growing debate among professional educators as to the wisdom and educational value of comprehensive high schools. This Court need not enter or take sides in the debate except to the extent that the decision may facilitate or deter efforts to achieve a unitary system. Otherwise, it is an educational decision.

It is impossible to justify maintenance of Pearl, Cohn, and Bellevue in the southwest quarter of the county alongside the three comprehensive high schools (Hillwood, Overton, and Hillsboro) that have been built in the same quadrant. At the anticipated enrollment for 1983, these three new comprehensive high schools could accommodate all students in the

southwestern quadrant, leaving the Pearl, Cohn, and Bellevue buildings available for other uses, and still have *1156 empty seats.*[40] Under the same 1983 projections, the new Whites Creek Comprehensive High School can absorb all Joelton students and still have *372 empty seats.* (Exhibit 155).

Such underutilization seems economically unjustifiable and there is no basis upon which the Court could mandate it.

More importantly, the intervenors' plan substantially resegregates most of the proposed "traditional" high schools. Initially, Madison would be 97.8 percent white, DuPont would 98.8 percent white, Antioch would be 96.2 percent white, Bellevue would 97.1 percent white, and Pearl would 92.7 percent black. Some of the currently integrated comprehensive high schools would revert to identifiably black or white schools: Overton would become 96.2 percent white, Hillsboro would become 95.9 percent white, and McGavock would become 96.4 percent white. Intervenors would rely on the voluntary components and magnet aspects of their plan to bring these schools to a minimum 10 percent of either race as a minority in such schools. However, the prospect of such an eventuality is unduly optimistic at best.

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[40] The following projections were made for 1983 (assuming the construction of both the Pearl-Cohn and Goodlettsville-Madison Comprehensive High Schools):

	Capacity	Students	Empty Seats
Hillsboro	1751	959	792
Overton	1819	1336	483
Hillwood	2190	1206	984
	2259		
Pearl-Cohn	1100	1103	-3

Thus if the Pearl, Cohn, and Bellevue students were incorporated into Hillsboro, Overton, and Hillwood, there would still be 1156 empty places. (Exhibit 155).

IX. THE COURT'S RESPONSIBILITY

A. *A "Unitary" System*

[1] Once a finding has been made that a racially discriminatory dual school system has been maintained,[41] it is the responsibility of the School Board, under supervision of the Court, to achieve a "unitary" school system. *Green* v. *County School Bd.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). Perhaps intentionally, no precise definition of what constitutes a "unitary" system has been laid down. In *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19, 21 (1969) (per curiam), the Supreme Court mandated a system "within which no person is to be effectively excluded from any school because of race or color." This definition was reiterated in the concurring opinion of Chief Justice Burger in *Northcross* v. *Board of Educ.*, 397 U.S. 232, 237, 90 S.Ct. 891, 893, 25 L.Ed.2d 246, 250—51 (1970) (per curiam).

Pursuant to this Court's direction to seek public input to the proposed plan, the Board invited definitions of "unitary school system" at its public hearings. Some of these bear repeating:

> By the nature of the title an Unitary School System implies oneness of opportunity for all children, oneness of administration, oneness of financial support, oneness of educational philosophy, oneness with Metropolitan Government, and oneness geographically centered at and emanating from the heart of the innercity.

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[41] The defendant, then Board of Education of the City of Nashville, conceded shortly after this case was instituted that the state laws under which defendant operated a dual system were unconstitutional. *See Kelly (sic)* v. *Board of Educ.*, 159 F.Supp. 272 (M.D.Tenn.1958); *Kelley* v. *Board of Educ.*, 139 F.Supp. 578 (M.D. Tenn.1956).

Councilman William E. Higgins

> A Unitary School System is that system which is designed and functions to the extent that equal resources and access to quality education are available to all parts and groups of a given community.

Rev. Amos Jones, North Nashville Community Council & Social Action

> A unitary school system is one offering each student equal access to the facilities, materials and staff to provide the opportunity to meet his/her educational needs. This uniformity of opportunity must also extend to parent, family and citizen involvement in the educational system.

Exhibit 2 to plaitniffs' proposed plan, filed Feb. 11, 1980.

Brown v. *Board of Educ. (Brown II)*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), broke down the barriers excluding black children from attending schools with white children. *Green* v. *County School Bd., supra,* described the ultimate goal to be a unitary, nonracial system of public education, and onerated school boards to "come forward with a plan that promises *realistically* to work, and promises *realistically* to work *now*." 391 U.S. at 439, 88 S.Ct. at 1694, 20 L.Ed.2d at 724 (emphasis added). *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), identified and utilized transportation of students to acheive racial mix, and gerrymandered zone lines and/or noncontiguous zones as permissible remedial devices to achieve a unitary system. *Milliken* v. *Bradley (Milliken I)*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), emphasized the *remedial* nature of the Court's responsibility and expanded the charge to include such action as would as nearly as possible "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746, 94 S.Ct. at

3128, 41 L.Ed.2d at 1092. *Milliken* v. *Bradley (Milliken II),* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), specifically approved remediation in the form of educational components designed to "restore the victims of discriminatory conduct to the position they would have *enjoyed in terms of education* . . .." *Id.* at 282, 97 S.Ct. at 2758, 53 L.Ed.2d at 757 (emphasis added).

Thus the definition of a "unitary" school system has expanded from *Brown* to *Milliken* from a mere destruction of barriers, to pupil assignment, to remediation and quality education.

B. *Racial Ratios*

As noted above, the thinking of sociologists, educators, legal scholars, black plaintiffs, and jurists has also undergone evolution. Earlier literature and studies of varying methodological purity postulated a benefit to black children from a school setting in which white middle class children were in the majority. This thinking has changed significantly.[42]

Swann may have been misinterpreted to state a requirement of racial ratios in all schools unless the Board could carry the heavy burden of proving the rationale of the exception. Thus, it has perhaps appeared that the achievement of racial ratios has become an *end* of litigation of this type, rather than the *remedy* it was conceived to be. District Judge McMillan, in the *Swann* case, indicated that such a future emphasis would be misplaced:

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[42] In his testimony during the hearings, Dr. Scott repeatedly questioned and criticized the assumption that it is necessarily more advantageous to black children to attend majority white rather than majority black schools. *See* discussion in section 4 of Part VI, *supra. See also* Bell, *Brown* v. *Board of Education and the Interest-Convergence Dilemma,* 93 Harv.L.Rev. 518 (1980).

> This court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*

Swann v. *Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 25 n. 9, 91 S.Ct. at 1280 n. 9, 28 L.Ed.2d at 571—72 n. 9 (emphasis in original), *quoting with approval* from Judge McMillan's memorandum of August 3, 1970.

The Supreme Court, in *Swann,* observed the "familiar" metropolitan phenomenon (present in Nashville) of concentrations of black population in one part of the city. It further recognized that, as a result of this phonomenon, "certain schools may remain all or largely of one race until new schools can be provided or neighborhood patters change." 402 U.S. at 25, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. No specific degree of racial mixing is mandated by *Swann* nor is "desegregation" defined as requiring every school to reflect the racial composition of the system as a whole.[43]

Busing and zoning are *"permissible* tool[s]," 402 U.S. at 28, 91 S.Ct. at 1282, 28 L.Ed.2d at 574 (emphasis added), in fashioning a remedy. From *Brown II* forward, the courts' responsibility has been equitable in nature. "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a

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[43] In *Pasadena City Bd. of Educ.* v. *Spangler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), the Court reiterated that there was no "substantive constitutional right [to a] particular degree of racial balance or mixing . . .." *Id.* at 434, 96 S.Ct. at 2703, 49 L.Ed.2d at 607, *quoting Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra,* 402 U.S. at 24, 91 S.Ct. at 1280, 28 L.Ed.2d at 571.

practical flexibility in shaping its remedies . . .." *Brown* v. *Board of Educ., supra,* 349 U.S. at 300, 75 S.Ct. at 756, 99 L.Ed. at 1106.

[2] As remedies, each must be subjected to the traditional balancing tests required of a court of equity; effectiveness must be weighed against other available alternatives, and each alternative must be assessed in terms of its relative costs. This was the command of *Brown II,* it was the lesson of *Green,* it was the essence of *Swann,* it reached full flower in *Milliken II.*

Such a balancing is particularly appropriate in the case before this Court. Here, we are not dealing with a "conversion from a dual to a unitary system," as the Swann Court faced. 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. This Court has been dealing with the problem for 25 years and this system has had in place a *Swann*-type remedy for nine years. Here we are assessing the effectiveness of the remedy and such changes as are made should be done in light of this experience.

X. THE EFFICACY OF THE REMEDY

[3] A partial assessment of the remedy under the 1971 order was contained in the recitation of history in Parts II—V above. It cannot be overemphasized that an evaluation and consideration of modifications to the *Swann*-type remedy in effect in this county could not be possible had a comprehensive desegregation order requiring busing not been decreed and implemented. Were this Court addressing the situation in this county as it existed in 1971, there would be no alternative but to order the implementation of a plan that entailed school pairings, noncontiguous zoning, and substantial busing. Nothing in this opinion should reflect a diminution of the realization of the necessity of such an order in 1971.

It is only after nine years of zoning and busing to achieve a desegregated system and the changes that have taken place in the community and in the attitude manifested by the School Board that it is possible to reevaluate the efficacy of the remedy incorporated into the 1971 order. With this understanding, the Board's proposed plan will now be scrutinized as to its efficacy in terms of:

1. Its realistic promise of achievement of a unitary system;

2. Its relative burden on black and white children;

3. Its social cost in the deterioration of public support for education;

4. Its educational cost; and

5. Its economic cost.

A. *Realistic Promise of Achievement*

The Board's plan was proposed in good faith reliance upon the assumption that the August 1979 order of this Court and the legal precedent of *Swann* required a "more-of-the-same" type of remedy. The plan would achieve an initial racial mix in which blacks will, in nearly all cases, be in the minority. But will these ratios be realistically achieved or, if initially achieved, will they be capable of realistic maintenance?

The spectre that haunts all of the parties to this case, the Court, and the community is a public school system populated by the poor and black, and a private school system serving the affluent and white. The Board presented as one of its witnesses Dr. Rilchard A. Pride, Associate Professor of Political Science, Vanderbilt University. Dr. Pride was commissioned by the Board to study "Patterns of White Flight: 1971—1979," and his scholarly study and analysis appear in the record as Exhibit 247.

Dr. Pride took the statistic of a decline in white enrollment in the public schools of 22,098 between June 1971 and June 1979[44] and sought to explain the decline. He found that:

> "white flight" is a significant problem in Nashville. In brief, it was found that in 1979 each cohort (grade level) was about 15 percent below what would have been expected in the absence of court-ordered busing, (2) this average cohort loss has increased since 1971, when the average cohort was only 8 percent below expectations, (3) most of the loss in recent years has occurred in the birth to first grade interval, where there was an average loss of 14 percent from expected levels, (4) there is a steady increase in the private school contingent in the school age population, including 1st grade, where the private schools captured 20 percent of the entering cohort in 1978—79, a 9 percent rise in eight years.
>
> White flight also manifested itself as within-system migration. The analysis found that there is a flight of up to 49 percent in some cluster schools located in black areas from among white cohorts which began school in desegregated 1-4 schools. The loss in cluster area schools is congruent with a marked gain in non-court-ordered 1-6 grade schools in many outlying areas.

R. Pride, *Patterns of White Flight: 1971-1979,* at 14-15 (1980). His most disturbing statistical prediction was that we can expect 25-30 percent of the elementary age children to be in private school in the middle to late 1980s. If the goal of previous efforts has been to achieve an integrated school experience, the depress-

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[44] In June 1971, there were 66,393 white students in Metropolitan Nashville schools as opposed to 44,295 in June 1979.

ing reality of Dr. Pride's study[45] is that our efforts have been less than fruitful, if not to some extent counterproductive.

This phenomenon is only partially the result of the remnants of racial prejudice. From the testimony in this case, the Court concludes that other parental concerns have a greater impact than the bus ride or racial prejudice. It was apparent from the testimony, from letters received by the Court, from letters received by the Board, *see* Collective Exhibit 170, and from the public hearings conducted by the Board, *see* Collective Exhibit 205, that the greatest concern is with the quality of education received, or perceived to be received. It was testified repeatedly

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[45] An earlier study of Dr. Pride and Dr. J. David Woodard on the white flight phenomenon in Nashville, Memphis, and Louisville, entitled "Busing and White Flight: Implementation Plans in Three Southern Cities," was presented as Exhibit 246. In this connection, one should note that in the Coleman II Study, Exhibit 63B, Dr. James S. Coleman found that there is an almost inevitable significant loss of white children from public school systems when desegregation occurs. He concluded the analysis of his study by stating:

> that the emerging problem with regard to school desegregation is the problem of segregation between central city and suburbs; and in addition, that current means by which schools are being desegregated are intensifying that problem, rather than reducing it. The emerging problem of school segregation in large cities is a problem of metropolitan area residential segregation, black central cities and white suburbs, brought about by a loss of whites from the central cities. This loss is intensified by extensive school desegregation in those central cities, but in cities with high proportions of blacks and predominantly white suburbs, it proceeds at a relatively rapid rate with or without desegregation.

J. Coleman, S. Kelly & J. Moore, *Trends in School Segregation, 1968-73,* at 79-80 (1975). Dr. Coleman's description of cities in which the black population is concentrated in the central city and the suburbs are predominantly white applies to Nashville-Davidson County and is the crux of the problem in this county.

that the important factor is what happens at the end of the bus ride rather than how long the ride.

Except to the extent that the largely undefined (and unfunded) magnet portion of the plan may be so designated, there are no educational components to the plan. It is merely a student assignment plan to provide racial ratios. Such a further disruption without massive efforts to make the public school system more attractive will further deteriorate public support and will engender more flight to private schools. The witnesses for all parties predicted such an increase as an inevitable result of the plan, and the Court so finds.

Further, in consideration of the efficacy of the 1971 remedy and the hoped-for efficacy of the Board plan, the Court received testimony on the improvement in achievement test scores of both black and white children from 1971 to the present. *See* Exhibit 249. No scores were available before 1971 and thus no basis of comparison existed for pre-busing achievement. Different tests were utilized and the statistics for some years may not be comparable. However, there does appear to have been improvement in both black and white stanine scores in both math and reading over the period. The gap between black and white achievement has narrowed slightly, but average black achievement in both math and reading is still well below national norms and the gap between black and white achievement remains substantial.[46]

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[46] In 1978 the average reading gap ranged from 1.2 stanines in the second grade to 1.62 stanines in the eighth grade. Narrowing of the reading gap by grade level from 1971 to 1978 ranged from a .1 reduction in the sixth grade to a .65 reduction in the second and third grades. Improvement in recent years seems to have plateaued and little reduction appears after 1975. Exhibit 249. *See also* Report on Standardized Testing, prepared by the Board in February 1979, Collective Exhibit 240, in which the Board Reported that 77 percent of the public school students in this county achieved scores in reading and mathematics at a level average to or above the national test scores.

The "osmosis effect," or use of white children as a principal learning resource for black children, appears not to have had the desired result, at least in isolation. These data strongly suggest the necessity for educational components both as an essential ingredient to the remedy and also as a reinforcement to parental perception of, and *support for,* the system. As noted by the Supreme Court in *Milliken II,* and as is obviously present in this case, "[p]upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures." *Milliken* v. *Bradley,* 433 U.S. 267, 287-88, 97 S.Ct. 2749, 53 L.Ed.2d 745, 760 (1977).

B. Disparity of Burden

The Court finds that the plan submitted by the Board disparately onerates young black children with the burden of achieving desegregation.

As noted above, with few exceptions, black children do not attend the same school for grade one as for kindergarten. Also with few exceptions, black children are bused out of their neighborhoods for grades 1-4, while white children remain in their neighborhoods for these early grades.

The Court drove the route from North Nashville to Andrew Jackson School. The route covers 20.6 miles and required 42 minutes. More significant, however, than the time or distance is the inaccessibility of the area by other than automobile. A child who becomes ill at school and needs a parent, or a parent who needs a conference with a teacher, will create a transportation problem requiring an expensive solution by taxi or a very time-consuming bus ride with transfers if the parent does not have an automobile. This defies logic and creates an almost impossible barrier to liason between parent and teacher. These children *never* attend a school in their neighborhood for the entire twelve years, unless they elect for the grades 1-2 Buena Vista option.

Similarly, young black children from the Cameron area are taken substantial distances to Una, Lakeview, Cole, and Haywood. Haynes area young black children travel to Old Center, Gateway, and Amqui. Wharton area young black children travel to the southeast corner of the county to Brookmeade, Gower, and Westmeade. Children in the area of Caldwell school (proposed for closure) would go to a yet undetermined school for kindergarten, travel to Baxter for grades 1-2, travel on out to Chadwell, Stratton, and Neely's Bend in 7-8 and Madison and Goodlettsville (or Goodlettsville-Madison Comprehensive High School) for 9-12. Black children in the shadow of Head Elementary School and Pearl High School would go to Head for kindergarten, travel out to Hill, Woodmont, Sylvan Park, or Eakin for 1-4, come back in to Head for 5-6, travel out again to Apollo for 7-8, and out again to Antioch for 9-12.

No similar treatment of white children exists.

C. The Social, Educational, and Economic Costs

The potentially devastating social cost of a public school system serving only the lower socioeconomic segments of our society has been alluded to earlier. The prospect of such divisiveness, and its probable geometric progression into post-school societal interaction, is frightening. Public education is the cornerstone of democracy, but public education without public support will almost certainly erode to the point that it will no longer represent this solid base upon which we can continue to build.

Dr. Pride's testimony is undisputed and is supported by other witnesses. The Board plan will not only fail to engender a revival of public support, it is also uniformly predicted to engender further exodus from the public school system. The

Court finds that such a result negates the efficacy of the remedy, and it is an unacceptable social cost.

The educational concessions made to facilitate achievement of desired ratios have also been referred to above. The choice of a four or five-tiered system over the educationally preferred three-tiered system is only one of these. The lack of continuity for the child and the difficulty of liason between parent and teacher occasioned by the use of noncontiguous zoning, particularly in the early grades, is an admitted educational detriment. The inability of the child from noncontiguous zones to participate in extracurricular activities after school is a further admitted educational cost of the plan. The allocation of a finite amount of resources to transportation costs rather than educational improvement is inherent in the plan. Dr. Bill Wise, Assistant Superintendent of Schools and a principal witness for the Board, testified that elimination of the cost of transporting students in the first four grades would be sufficient to reduce the pupil-teacher ratio from 25 to 1 to 15 to 1 in those grades. The overwhelming testimony from the educator experts was that the remedial benefits of smaller pupil-teacher ratios in these early grades would far exceed any benefit obtained from an "osmosis" effect. Such educational costs weigh heavily in the balance of this consideration of the efficacy of the remedy.

The Board plan would add transportation costs of $3.5 million with the use of elementary magnets. (Exhibit 193). This Court judicially notices the existence of a national fuel crisis as well as a serious downturn in the economy. Fuel prices are many times what they were when the plan was implemented in 1971. Some transportation will continue to be necessary. However, rational balancing of cost-benefit demands a consideration of alternative methods of transportation that may be more efficient, and alternatives to transportation as a remedial device.

For all of the above reasons, the Court must reject the Board's proposed plan. The intervenors' plan, although it of-

fers attractive and creative ideas, must also be rejected because of its lack of refinement and the flaws noted in Part VIII above.

The Court lacks the resources to devise modifications to either the Board's plan or the intervenors' plan or to develop an alternative plan on its own. It is necessary, therefore, to refer the plan back to the Board under more specific guidelines. Such a re-referral may result in a deferral of implementation of parts or all of the plan for the coming school year 1980-81. Upon a consideration of this opinion and the guidelines hereinafter set out, the Board will report to the Court by July 1, 1980, on the feasibility of the generation of a new plan for the 1980-81 school year or any parts thereof and the necessity for deferral of development and/or implementation of any such parts.

XI. GUIDELINES AND SPECIFIC DIRECTIVES

A. Tier Structure

[4] The Board chose a four-tiered structure against its better educational judgment in order to facilitate racial balance. In view of the directive which follows this, the Board may now revert to a three-tiered structure. Whether this should be a K4-4-4 or some variation thereof which is more educationally sound and makes better utilization of buildings is a matter for Board determination.

B. *K-4 (or variation) of a Neighborhood Character*

As recognized in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra,* transportation of young children which "risk[s] the health of the children or significantly impinge[s] on the educational process" is to be avoided. 402 U.S. at 30-31, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

For all of the reasons set forth in the findings above, the Board should construct its first tier of kindergarten through early elementary grades of a neighborhood character. Intervenors attempted such a construction under severe time constraints. The expert staff of the Board can do a more refined job, drawing lines that achieve better utilization of space, considering the need for kindergarten, special education, and other federally funded programs, and also maximizing the opportunities for integration.

C. Middle Schools

A 5-8 (or variation) middle school tier shoud be constructed which clusters schools from the first tier, but with the objective in clustering of bringing about a minimum presence of at least 15 percent of either race in the minority at each middle school. If necessary to meet this objective, noncontiguous zones may be utilized. These should be held to a minimum and where utilized, consideration should be given to assignment of the nearest such black or white children to create such presence. In this respect, consideration should be given to transportation accessibility by public transportation between the noncontiguous zone and the assigned school, as more fully discussed below. The school chosen for the middle school in each cluster should be as centrally located as possible to the whole of the students assigned thereto. Exceptions to this objective may be dictated by the location of buildings large enough to accommodate the student population.

The selection of 15 percent is arbitrary, as is any other number which may be chosen. Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of *Brown* and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation or amalgamation. It is not undemocratic, nor does it violate

equal protection of the laws to have a system that allows for recognition of and respect for differences in our society. A rigid adherence to racial ratios premised upon the social goal of assimilation, which in the process demeans, diminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable. (*See* testimony of Dr. Walter Leonard.) The 15 percent minimum objective was chosen at the suggestion of plaintiffs because it seems to represent a reasonable attempt to provide intercultural and interracial contact as a foundation for social harmony. As such it is a goal worthy of the wholehearted support of parents and the community, and for the attainment of which some expense and inconvenience should gladly be endured.

D. High Schools

The Board's initial plan after 1971 (with tacit approval from the Court at that time) of ringing the city with comprehensive high schools would have brought about complete desegregation. Had the job been completed and had there not been some errors of judgment in school placement, much of the present controversy could have been avoided. Ethnic attachment and insistence on the retention of Pearl, and community and parochial insistence upon the retention of Pearl, and community and parochial insistence upon the retention of Bellevue, Joelton, and Cohn have created political problems for the Board in the pursuit and implementation of its comprehensive program. The remoteness of Antioch and DuPont has created logistical problems and impeded efforts that would have further implemented this educational decision. Controversy has arisen concerning the validity of comprehensive high schools as an educational vehicle. Some community pressure has been exerted for at least a partial return to, or the option of, a smaller, traditional high school. Intervenors suggest through their equity plan

the provision of such an option. Their suggestion has both educational merit and offers the hope of renewed support for the system. They err in the excess, however, from a desire to please as many as possible. By proposing the maintenance of all existing high schools, intolerable resegregation results, protected enclaves persist, and, pragmatically, serious underutilization of space is inevitable. The Board should consider the use of some traditional type high schools either as magnets per se, or containing magnet programs. Pearl, East, and West End appear to be well located geographically for such a magnet approach. All are in or near the central city and are served by public transportation. The number and location of such magnet-traditional high schools is a matter for Board determination in the exercise of its educational function and in consideration of financial constraints.

1. *Goodlettsville-Madison-Trinity Hills*

This proposed new comprehensive high school has been recommended by the Board since 1972. Land has been acquired. Building age and overcrowding have threatened loss of accreditation to existing high schools in the area served. This construction was a part of the initial plan of the Board for a ring of comprehensive high schools and promises to aid substantially in achieving desegregation. It should be built and the Court approves this portion of the Board's plan with attendance zones set out in Exhibit 14B. However, as discussed *infra*, the Board should include in the attendance zone and construct accommodations for the Old Hickory area (northern half of DuPont zone) in this school. These children can cross the river at Old Hickory Boulevard and are as close or closer to the site as most of the remainder of the zone. There is natural affinity between the Old Hickory and Madison communities. Such a zone modification will relieve overcrowded conditions in the DuPont zone, offer comprehensive education to the children in this

zone, and will further integration without the use of the present noncontiguous zone for DuPont from inner city North Nashville. The lower half ot he DuPont zone can be assigned to McGavock.[47]

2. *Pearl-Cohn Inner City Comprehensive High School*

The Board has determined the advisability of an inner city comprehensive high school and proposed to construct it in the approximate center of a zone now served by Pearl and Cohn High Schools. Although the economic justification may be subject to some question,[48] other considerations weighed heavily with the Board and are equally persuasive to the Court. Both Pearl and Cohn have a long and rich heritage of service to their communities. Both have provided outstanding graduates to the region and the nation. Adjoining as they are geographically, they will bring together a natural racial mix that will enhance the desegregation effort. The combination of names and communities will preserve the symbolic significance of the predecessor schools, and will provide an inner city structure offering comprehensive education to a contiguous and natural zone. Assignment of children in North Nashville (presently

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[47] In 1983, DuPont is scheduled for only grades 10-12 with a population of 967 and a capacity of only 784. McGavock will have 438 empty seats. The addition of some seats to Goodlettsville-Madison-Trinity Hills, plus the relief to be anticipated from some students attending magnet high schools should easily accommodate these DuPont area students. In addition, the DuPont anticipated student body includes students from a noncontiguous zone in North Nashville which will be discussed in the next section. Such a solution eliminates the need for $1,365,000 expenditure for an addition to DuPont. Exhibit 193.

[48] *See* discussion of the availability of seating projected for Hillwood, Hillsboro, and Overton, note 49 *infra*. However, with the closure of Bellevue, Antioch, and DuPont as hereinafter discussed, and with the assignment of students from the noncontiguous zones in the natural Pearl-Cohn area from Antioch and DuPont back to a Pearl-Cohn Comprehensive High School, this excess capacity will not be as present.

assigne to distant DuPont) and children from the Pearl-Head area (presently assigned to distant Antioch) will increase student and community identity with the school, and reduce transportation costs. Adjustment of the southern boundary of the zone, *see* Exhibit 164, to West End Avenue will increase the white percentage of students.

The construction of Pearl-Cohn Comprehensive High School is approved.

3. *Bellevue, Antioch, DuPont, Joelton*

These relatively small high schools in the outer fringes of the county have posed a problem to the Board both in implementation of its comprehensive high school plan, and in its efforts to achieve a desegregated system. There has been understandable community resistance to their closure. Attempts to bring about a black presence in Antioch and DuPont have necessitated distant noncontiguous zones and excessive transportation costs. All four of these noncomprehensive schools should be closed or converted to middle school or other uses.

Whites Creek was built to accommodate Joelton students. Hillwood was built to accommodate Bellevue students. Antioch students can be accommodated between Glencliff and Overton.[49] DuPont area students can be accommodated between the new Goodlettsville-Madison-Trinity Hills Comprehensive High School and existing McGavock.[50]

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[49] In the 1963 projection (Exhibit 155) Glencliff will have 308 empty seats and Overton will have 483 empty seats. Antioch is projected to have 1295 students, including 263 students from the noncontiguous Pearl-Head area zone. Excluding these students after their assignment to Pearl-Cohn, *see* section 2 *supra*, there would be 241 more students at Glencliff and Overton above capacity. Some adjustment of zone lines may be necessary from Overton to Hillsboro, which contains 792 empty seats, or the overage may be taken care of by the magnet schools, discussed in section E *infra*.

[50] McGavock is projected to have 438 empty seats in 1983.

4. *Proposed Addition to Maplewood*

In the Long Range Plan, with the building of Goodlettsville-Madison-Trinity Hills, Maplewood is projected to have a student body of 1734, 54 percent black, and a permanent capacity of only 1091 plus 499 portable classroom spaces. (Exhibit 155). The Board, therefore, proposes to build a $4,775,000 addition to Maplewood to accommodate 700 students. Since this decision does not affect desegregation efforts, the Court does not either approve or disapprove the proposal. However, adjacent Whites Creek will have 372 empty spaces in the same Long Range projection. If East is opened as a magnet school, much of this overcapacity should also be relieved. Cost consciousness and prudence would seem to dictate a delay in this capital expenditure to determine if zone adjustments to Whites Creek and magnet enrollments do not obviate this problem.

5. *DuPont High School*

As noted above, DuPont should be closed. The proposed addition of $1,365,000 to this fringe area school would further frustrate efforts to achieve desegregation. This expansion is disapproved.

E. *Magnet Schools*

The use of magnet schools as an adjunct to a pupil assignment plan not only offers a voluntary component to the desegregation plan but also adds significantly to the quality of the educational offering. It has proven effective in a number of cities as a method of achieving voluntary integration.[51] Intervenors demonstrated a substantial desire on the part of many residents of the county for the option of more traditional-type high schools. It appears that the utilization of magnet-type pro-

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[51] *See* N. Estes & D. Waldrip, *Magnet Schools: Legal and Practical Implications* (1978).

grams contained within several such traditional high schools, would be a significantly beneficial component to the plan. If these traditional high schools were open-zoned, centrally located, accessible by public transportation, offering unique educational opportunities, they should attract an integrated student body. Pearl, East, and West End all seem to meet these criteria. Pearl in particular should be considered for such alternative use. It is an attractive, functional building, accessible by several MTA routes. Such a usage would preserve the building as a source of black pride and symbolism in the North Nashville community. East and West End offer similarly attractive locations and existing facilities. Different magnet programs for each school should be considered.

This component of the plan is left to further development by the Board. Substantial savings should result from decreases in transportation costs in the elementary grades, from use of MTA services, discussed *infra,* and from reduction of noncontiguous zones. These resultant savings should be applied to this and other educational components of the newly devised plan.

F. *Transportation*

1. *Use of Metropolitan Transit Authority [MTA]*

One of the most appealing parts of the intervenors' plan was the proposal for close cooperation with and maximum utilization of the MTA system. It was shown that in many instances, MTA buses travel out toward suburban schools in the mornings virtually empty in order to bring commuters into the city to work. This is generally near school starting time. In the afternoons, MTA buses travel out with some of the same commuters only to return empty. It was further pointed out, and alluded to earlier in this opinion, that the availability of MTA transportation to a school tends to eliminate a feeling of alienation from the school, enhance the opportunity for parent-teacher liason, and open opportunities for after-school participation in ex-

tracurricular activities. MTA could establish feeder lines to operate in conjunction with shuttle buses and thereby reduce the number of buses and drivers required by the Board. The opportunities for cooperation and substantial savings in transportation cost are many. They await only imaginative exploration by transportation experts for the Board and the MTA.

The Court is assured of MTA cooperation. The Court directs the Board to immediately initiate and pursue discussions with MTA and to incorporate maximum utilization of public transportation in the design of the middle school plan and high school transportation services.

One of the major deficiencies of the present plan and the Board's proposed plan is the absence of any consideration of transportation for students who desire to participate in after-school, extracurricular activities. The plan must incorporate a reasonable accommodation of this essential component of an education.

Discussions with MTA and planning for open-zoned magnet schools must also consider public transportation as a complement, if not the primary resource, in achieving access to such magnets.

G. *Educational Components*

1. *Elementary Schools*

Substantial savings will accrue from the elimination of transportation for racial balance in the elementary schools affected by this order. Savings realized from this source should be utilized for educational improvement throughout the system. The Board shall consider and report its recommendations for educational components to the plan to the Court. Such educational components should be directed toward:

1. Provision of intercultural experiences on a periodic basis to those K-4 children who, because of lack of integrated housing in

their zoned neighborhoods, are in largely black or largely white elementary schools;

2. Reduced pupil-teacher ratios in those schools in which the achievement level of the school is below the average for the system;

3. Remediation efforts in those schools or classes within schools made up largely of socioeconomically deprived children who suffer the continuing effects of prior discrimination;

4. Such other areas as the professional staff may recommend and the Board may consider valid in developing ways to attack the problem of disparate achievement between black and white children, and, in general to improve the quality of education in Metropolitan Nashville-Davidson County.

2. *Curriculum on Black History and Culture*

Plaintiffs persuasively represented that this area of education has been largely ignored. The contributions of the black men and women of this country to the progress of our nation is a source of inspiration to children, black and white. The Board responded with a broad brush assertion, without specific examples, that such instruction has been generally incorporated into the curriculum. No evidence was offered that this is being done in a meaningful way or that its implementation was monitored to insure its realization. The plan of the Board will specifically address this question and propose methods of monitoring inclusion of such subject material into the regular curricula, as well as the offering of specific courses on black history and culture in the comprehensive high schools.

3. *In Service Training and Teacher Assignment*

The Board's proposed professional development program, "Together We Can-Together We Will," Exhibit 254, outlines a positive approach to development of understanding, sensitivity,

and cooperation in the implementation of a desegregation effort. It represents a good start. The Board and its staff should study further efforts in this regard and propose as a part of the revised plan specific efforts toward:

1. Insuring that teachers and staff are required to undergo sensitivity training to the special needs of black children from an underprivileged social environment; and

2. Insuring that the most sensitive of such teachers are assigned to those schools and classes where the desegregation experience is likely to be most problematic.

H. *Faculty-Staff Ratios*

Consideration of black-white ratios in the composition of faculty and staff was reserved until a later stage of the proceedings. Nevertheless, some testimony with respect thereto crept into the hearings thus far. Pending further hearings, the revised plan of the Board should include an affirmative action recruitment and hiring program that emphasizes the replacement of vacancies occurring by normal attrition with black personnel.

I. *Involvement of Plaintiff and Intervenors*

The Court has been impressed by the generosity of spirit and cooperative attitude demonstrated by the parties and counsel throughout the hearings on the matter. The Court believes this manifestation of good faith and common desire to achieve a workable solution to difficult problems is representative of the enlightened attitude of the great majority of the general populace of this county.

It is a solid foundation on which to build and we must nurture the climate thus created. In this regard the plaintiffs and intervenors are each directed to designate at least one represen-

tative of their choosing to attend regularly scheduled work-discussion sessions with staff members of the Board who are responsible for preparation of the report ordered by this Court on July 1, 1980. Utilization of these persons as a resource, and information relayed from them back to the parties can faciliate finalization of a plan and continue to foster the spirit of cooperation. It is not necessary to reiterate the non-adversarial, non-traditional character of the effort in which we are engaged.

J. *Involvement of the Community*

It is the fervent hope of this Court, in its official capacity, and in its unofficial capacity as a resident and parent, that the plan which eventually emerges from these efforts will be one which promotes equal educational opportunity, enhances interracial and intercultural communication and understanding, and improves the quality of education offered to all the children of this community.

To insure the success of the plan, the success of public education in Davidson County, and the success and happiness of our community in the future, it will be essential to enlist and utilize the good will and support of the community. The Board should develop a plan to enlist the aid of such groups as The League of Women Voters, Leadership Nashville, Metropolitan Nashville Community Education Alliance, the Metropolitan Mayor and Council, the media, civic and service organizations, to name only a few of the infinite resources available.

SUPPLEMENTAL APPENDIX D

Robert W. Kelley et al.

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, et al.

v.

State of Tennessee et al.

Nos. 2094, 2956.

United States District Court,
M. D. Tennessee,
Nashville Division.

April 17, 1981.

In a school desegregation case the board of education proffered its desegregation plan to which plaintiffs objected and proposed their own plan. The District Court, Wiseman, J., rejected plaintiffs' proposed plan as haphazardly constructed and unworkable and approved board's plan which included educational components and pupil assignment components.

Board's plan ordered adopted.

1. Federal Civil Procedure (key) 1127

Where on its face, the elementary portion of plaintiffs school desegregation plan was nothing more than an attack on order directing board of education to develop a new plan following certain specific directives and guidelines and it was contrary to plaintiffs own expert proof, such was stricken as impertinent and unresponsive to the court's directive. Fed.Rules Civ.Proc. Rule 12(f), 28 U.S.C.A.

2. Schools (key) 13(6)

Board of education's desegregation plan, which consisted of educational components and pupil assignment components, rather than plaintiffs plan was adopted where plaintiffs plan apparently was hastily drawn while board's plan, with modifications, met concerns with K-4 remediation, multicultural intercultural exchange, magnet schools, teaching of black history and middle schools and attendance zones were drawn to comply with mandate to achieve a minimum of 15% representation by race in middle schools without undue transportation burden on minority students.

Avon N. Williams, Jr., Richard Dinkins, Nashville, Tenn., for plaintiffs.

William R. Willis, Jr. and Marian F. Harrison, Nashville, Tenn., for defendant Metropolitan Bd. of Ed.

Frank J. Scanlon, Senior Asst. Atty. Gen., Nashville, Tenn., for third-party defendant State of Tenn.

MEMORANDUM

WISEMAN, District Judge.

This Court's Memorandum Opinion and Order of May 20, 1980, directed the Defendant Board of Education to develop a new desegregation plan following certain specific directives and guidelines regarding educational components and pupil assignment as set forth in that Opinion.[1] Those directives and guidelines resulted from many days of testimony beginning in the summer of 1979, and culminating in over 25 trial days in March and April of 1980. After the lengthy hearings, this Court

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[1] *See, Kelley* v. *Board of Education*, 492 F.Supp. 167 (M.D.Tenn. 1980).

determined that a different remedy for the remaining vestiges of segregation in Nashville was required, in view of the "tortuous twenty-five year history of desegregation efforts in Metropolitan Nashville," and the specific burdens and benefits found to emanate from the *Swann* remedy ordered by this Court and implemented by the Defendants in 1971. This Opinion considers the plan offered in the Board's effort to comply with the May 20, 1980, Order, and the Plaintiffs' proposals and objections relating to the ordered plan.

THE RECORD PRIOR TO THE 1981 HEARINGS

Prior to this Court's Order of May 20, 1980, many matters had gone unresolved in this litigation since 1971.[2] The Plaintiffs had filed several objections to the operation of the Court-ordered 1971 plan, which objections were addressed primarily to alleged disparate burden in transportation of young black children. As a result of these objections, along with other factors such as the Board's need for additional classroom space in the outlying areas not involved in the 1971 plan,[3] and the ever-increasing costs of transportation under the plan, the Court ordered the Board, on August 27, 1979, to develop a new desegregation plan for the entirety of Davidson County.[4] After many weeks of Board deliberation and community input at the Board level, the "Waldrip Plan"[5] was presented for the Court's

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[2] *Kelley* v. *Board of Education,* 492 F.Supp. 167, 168-75 (M.D.Tenn.1980).

[3] The 1971 *Swann* remedy left a ring of schools in the outlying areas untouched by the plan because of the distances involved in transportation to and from these schools.

[4] *Kelley* v. *Board of Education,* 479 F.Supp. 120 (M.D.Tenn.1979).

[5] The planning team for the Board was headed by Dr. Donald Waldrip, whose qualifications were set forth in the Court's Memorandum Opinion of May 20, 1980. *Kelley* v. *Board of Education,* 492 F.Supp. 167, 177 (M.D.Tenn.1980).

scrutiny. The Plaintiffs were invited by the Court to submit an alternative plan, but this offer was ultimately declined. Instead, the Plaintiffs chose to rest their case on specific criticisms leveled at the Waldrip Plan by the Plaintiffs' expert witness, Dr. Hugh Scott. A group of intervenors were also permitted to file a plan.

Consideration of the two plans, along with the Plaintiffs' objections, resulted in the Court's rejection of both plans, and in the Court's directive to the Board to develop another plan following the specific guidelines set forth in the Court's Opinion. Based on the testimony offered during the hearings on the two plans, this Court made an effort to carefully balance the benefits and burdens imposed by the *Swann*-type remedy employed in the 1971 Order and in the Waldrip Plan, and set forth the following directives for inclusion in the new Board proposal:

I. *Educational Components.*

A. Intercultural experiences for children in predominately one race schools.

B. Reduced pupil-teacher ratios in schools having achievement levels below the average for the system.

C. Remediation efforts in schools or classes made up largely of socioeconomically deprived children who suffer the continuing effects of prior discrimination.

D. Black history and black culture curriculum.

E. Teacher in-service training in preparation for the implementation of the plan.

F. Magnet school(s) offering unique educational opportunities.

G. Middle school programs.

II. *Pupil Assignment.*

A. A three-tiered system of grades utilizing K-4, 5-8, 9-12, or some reasonable variation thereof.

B. Schools having a neighborhood character for the lower elementary grades without the use of non-contiguous zoning arrangements.

C. Middle schools having a minimum 15% representation of either race, utilizing non-contiguous zoning where necessary.

D. Use of the closest other race population for necessary non-contiguous zones.

E. High school zones in conformity with the Court's directive, including closing and/or changing the use of Bellevue, Joelton, DuPont, Antioch, Madison, Pearl, and Cohn high schools.

F. Construction of the Goodlettsville-Madison and Pearl-Cohn comprehensive high schools, with the corresponding closure or change in use of Goodlettsville, Madison, Pearl, and Cohn.

G. Delay the addition to Maplewood High School and consider adjustments to the Whites Creek zone and the impact of proposed magnet school enrollments to acommodate the large enrollment at Maplewood.

On June 25, 1980, the Defendant Board of Education made a preliminary report to the Court regarding a timetable for implementation of the Court's Order. Pursuant to what the Board representatives deemed to be the suggestion of the Plaintiffs, the Board's proposed timetable included a plan where first graders could remain in the school wherein they attended kindergarten, thereby presumably aiding in the transition be-

tween kindergarten and first grade.[6] A hearing was held on the proposed timetable for implementation, and the Plaintiffs objected to the rezoning of first graders during the interim. Following the hearing on July 15, 1980, the Court entered an Order rejecting the first grade proposal, approving the remainder of the timetable for the pupil assignment components, and relieving the Defendants of the obligation to confer with representatives of the Plaintiffs and Intervenors during the planning process.[7]

The Board filed its proposed desegregation plan on January 19, 1981.[8] Following the filing, this Court directed the Plaintiffs and the Intervenors to respond by way of specific objections to the plan by February 9, 1981. The Intervenors moved for leave to withdraw from active participation in the hearings on the new plan, and this motion was granted.

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[6] Dr. Hugh Scott, expert witness for the Plaintiffs, testified extensively about the need for a smooth transition between these grades.

[7] The Court also ordered the Board to reconsider its decision to permit 12th graders to remain at Bellevue and Joelton, while closing those high schools to other grades pursuant to the Court's directive. The Board subsequently voted to close those schools as high schools for the school year 1980-1981, which was reported to the Court on July 25, 1980.

[8] Counsel for the Board noted in a response to the Plaintiffs' later request for additional time to respond to the plan and in the hearings on March 30, 1981, that the Plaintiffs had access to the plan long before January 19, 1981. Specifically, Board counsel stated as follows: Details of the proposed plan were widely aired in public meetings during November and December, 1980. On or about December 15, 1980, after the approval of the long range pupil assignment plan by the Board, a copy of the statistical data supporting the plan was forwarded to the Plaintiffs, and an invitation to view the bulky maps, which had not yet been duplicated, was extended to the Plaintiffs by Board counsel. The entire package of maps and statistical information was forwarded to the Plaintiffs on or about January 12, 1981, with the remainder of the plan, including the interim proposals and educational components, being delivered to the Plaintiffs on January 19, 1981. No exception was taken to this representation of the events by Plaintiffs' counsel.

On or about February 6, 1981, the Plaintiffs moved the Court for additional time to file objections up to and including March 31, 1981. Accompanying that motion was an initial submission of objections, and an indication that the Plaintiffs had not been able to meet with one or more possible expert witnesses regarding the plan. The motion was granted in part, extending the time for responding until March 16, 1981, with the notation that any hearings, if necessary, on the plan and objections would begin on March 30, 1981, and would continue thereafter until concluded.

On March 10, 1981, the Plaintiffs filed a second motion for extension, based on the fact that the Plaintiffs' lead counsel was ill and hospitalized. From this motion, and from a status conference on or about March 10, 1981, attended by Plaintiffs' counsel, this Court and the Defendants learned for the first time that an alternative plan was contemplated by the Plaintiffs. The request for an extension was granted until March 25, 1981, giving the Plaintiffs leave to reapply for an extension if counsel's health had not improved. The Order contained a further notation that hearings remained scheduled for March 30, 1981.

On March 25, 1981, the Plaintiffs filed their supplemental response, along with an alternative plan. On March 27, 1981, the Defendants moved to strike the Plaintiffs' plan and to affirm the Board's plan without a hearing. The Court then ordered a hearing on all pending motions for determination of status of the case for March 30, 1981.

THE PLAINTIFFS' PROPOSED PLAN

On March 30, 1981, the Court heard the Board of Education's "Motion to Strike Plaintiffs' 'Conceptual' Pupil Assignment Plan and to Approve Defendants' Proposed Plan Without Hearing." The Court construes this motion as one made under Rule 12(f), Federal Rules of Civil Procedure, as a motion to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

The primary basis for the Board's motion to strike the Plaintiffs' plan and certain objections to the Board's plan is that the primary thrust of the Plaintiffs' response constitutes an attack on the Court's Order of May 20, 1980, rather than an effort to produce a plan to comply with the Court's Order. In addition, the Board argues that the Court's Order of May 20, 1980, was in large measure based upon the testimony of the Plaintiffs' own expert witness, Dr. Hugh Schott. An examination of the Plaintiffs' plan and many of their objections reveals that the Board's position is substantially correct.

The Plaintiffs' proposed plan recognizes from the outset that elementary children will be transported long distances outside their neighborhoods, contrary to the Order of May 20, 1980. Furthermore, the elementary pairings were developed so as to closely approximate the current ratios existing in the community. The pairings and clusterings necessitate at least a four-tiered grade structure (which is inconsistent with the position taken by the Plaintiffs at the hearing), with students attending at least two elementary schools, one middle school, and one high school. Some students would attend three elementary schools since kindergarten is often separated from grades one and two. (Exhibit 284, offered for Identification).

In designing their elementary and middle school pairings and clusterings, the Plaintiffs have used the same method rejected by the Court in the form of the Waldrip Plan previously presented by the Board. Both the Waldrip Plan and the Plaintiffs' plan use "more-of-the-same remedy" employed by the Court in 1971, and rejected by the Court in 1980.[9] This Court made a specific factual finding that this remedy is no longer ap-

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[9] This is where that similarity stops, however. The Waldrip Plan was fully fleshed out with improved feeder patterns and as little transportation as possible under a proposed *Swann*-type remedy. This is not the case with the Plaintiffs' plan.

propriate in Nashville, after carefully weighing benefits against burdens and the nine year operational history of the school system under the *Swann*-type remedy.

A large portion of this Court's Order of May 20, 1980, consisted of this balancing process—weighing the benefits of the *Swann*-type remedy against its burdens. The costs and burdens were largely derived from the testimony of Dr. Hugh Scott, the Plaintiffs' expert witness. He testified to the educational importance of a three-tiered school system, and the deleterious effect of disrupting a child's early education by splitting the primary grades among different schools. He testified further to the importance of parental involvement in early childhood education, which he felt could only be fostered by having the schools in such a location that the parent could frequently visit the school, talk with teachers, become personally involved, and contribute services. He also testified that the "osmosis effect" or "rightness of whiteness" approach to desegregation mandating a given racial percentage in each school and rejecting predominately black schools was inherently racist and without educational validity.

[1] This Court was impressed by Dr. Scott's testimony and relied upon it, only to have an elementary school plan proposed by the Plaintiffs which was totally contrary to this most persuasive testimony. Since the elementary portion of the Plaintiffs' plan on its face constitutes nothing more than an attack on the Court's Order of May 20, 1980, and is contrary to the Plaintiffs' own expert proof, it is stricken as impertinent and unresponsive to the Court's directive under Rule 12(f), Federal Rules of Civil Procedure.

While the obvious failure of the Plaintiffs' elementary school proposal to comply with the Court's Order of May 20, 1980, precluded testimony on that portion, the Court did permit the Plaintiffs to present their middle school plan, which their new

expert witness, Dr. William M. Gordon,[10] stated was independent of the elementary school portion.[11]

Throughout Dr. Gordon's testimony, it was apparent that all portions of the Plaintiffs' proposed plan, including the middle school plan, were hastily drawn by consultants[12] who had little or no familiarity with the demography, the major arteries, the location of children, the capacities of buildings, and other pertinent information. Further, the consultants who participated in the drawing of the Plaintiffs' plan did not take time to study these variables or to visit the city for any appreciable length of time. Dr. Gordon admitted that an entire chapter of his book regarding desegregation in America was devoted to the importance of knowing these crucial details regarding a city when preparing a desegregation plan.

The Plaintiffs' middle school plan is superficial at best. The consultants merely paired the Board's proposed elementary zones into middle schools, with a total lack of regard for building capacities and the distances between non-contiguous zones for the schools. No projected enrollments were set forth in the Plaintiffs' plan, and accordingly, it was impossible to evaluate how well the mechanics of the system would work. Mr. Ray Osborne, Director of Zoning and Real Property for the

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[10] Dr. Gordon is a Professor in the Department of Educational Leadership, Miami University, Oxford, Ohio. (Exhibit 280). He is a member of HGH Associates, an educational consulting firm specializing in desegregation plans.

[11] The Plaintiffs did not propose an alternative high school plan, thus apparently accepting the Board's proposal for high schools.

[12] In addition to Dr. Gordon, see note 10, *supra*, Dr. Larry W. Hughes (Exhibit 281), and Dr. James B. Andrews (Exhibit 282), participated in the drawing of the Plaintiffs' desegregation plan. Dr. Hughes and Dr. Andrews are also members of HGH Associates.

Board of Education, calculated enrollments for the Plaintiffs' middle schools and found numerous schools to be overcrowded.[13]

An examination of the map depicting Plaintiffs' middle school plan (Exhibit 266), reveals numerous instances of unreasonable zoning arrangements for both races. For example, students in the Cumberland non-contiguous zone on the Sumner County line would be required to ride to a zone on the Cheatham County line to attend Cumberland. Students in the Antioch non-contiguous area in the innercity would be transported to Antioch in southwest Nashville. Students in the Joy and Stratton areas would be transported across the Cumberland River to Donelson. Students in the Ross area near the central city would be required to ride to Goodlettsville. Other pairings are similarly unreasonable,[14] but in all there is an apparent disregard for distances, for the location of rivers, for bridges, and for major thoroughfares. On cross-examination, Dr. Gordon could not show the Court how a bus would travel from one of these distant zones to another, thereby indicating a total lack of familiarity with such practicalities.

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[13] For example, it was calculated that Meigs Middle School would have an enrollment of 1348, with a capacity of 850, that Rose Park Middle School would have an enrollment of 1235, with a capacity of 690, that McMurray would have an enrollment of 1280, with a capacity of 926. Other schools were apparently severely underutilized. For example, Moore would have an enrollment of 404, with a capacity of 906, Pearl would have an enrollment of 852, with a capacity of 1295, and Cohn would have an enrollment of 744, with a capacity of 1136.

[14] In addition to those set forth in the text, see the remaining pairings on the map, Exhibit 266:

Wright	—	Glencliff, Early, Brookmeade
Meigs	—	Warner, Glengarry, Hickman, Haywood
Apollo	—	Una, Kirkpatrick, Fall-Hamilton
Rose Park	—	Carter-Lawrence, Berry, Lakeview

The middle school plan also fails to abide by the Court's Order of May 20, 1980, as well as the testimony of Dr. Scott, the Plaintiffs own expert witness. Indeed, the testimony of Dr. Gordon revealed that his "theory" of desegregation was totally contradictory to that of Dr. Scott. While Dr. Scott had previously rejected the racial balance approach, had attacked the validity of the theory that black children must sit beside white children to learn, and had applauded the idea that black schools were not inherently bad, Dr. Gordon's testimony and the middle school plan presented by the Plaintiffs take the opposite position.

Dr. Gordon and his associates sought specifically to structure school zones reflecting the racial makeup of the community. Blacks are in the majority in only one of the Plaintiffs' proposed 24 middle schools.[13] In drawing the zone lines in this fashion, Dr. Gordon created the impractical transportation routes described above. The Plaintiffs' plan does not comply with the Court's order that middle schools should have a minimum of 15% either race, which was a modification of the racial balance approach based on the Plaintiffs' previous position expressed by their expert witness, Dr. Hugh Scott.

From all of the above, it is apparent from the middle school plan, as from the elementary school plan, that the Plaintiffs have not complied with the Court's Order of May 20, 1980. The plan they have created is at best haphazardly constructed and unworkable. Accordingly, the Plaintiffs' middle school plan is rejected.

THE BOARD'S PLAN

[2] As the Court decreed in its Order of May 20, 1980, the Board of Education's plan consists of two parts—the educational components and the pupil assignment components.

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[13] Pearl.

I. *The Educational Compontents.*

The responsibility for developing the educational components was divided into six bi-racial committees of central office staff members, teachers, and citizens, for each the various sub-components: (1) K-4 remediation; (2) multicultural/inter-cultural exchange; (3) magnet schools; (4) black history; (5) middle schools. (Exhibit 273). The timetable for development of the various components was approved by this Court on July 15, 1980, and the committees' work has substantially complied with the time frame set forth, with the possible exception of the magnet school proposal discussed more fully, *infra*.

In line with the Court's directive, the Board has proposed a K-4 Intervention/Remediation Program, which will be directed toward those schools or classes where the achievement levels are below the average for the system and/or where the majority of a school's population is made up largely of socio-economically deprived children who suffer the continuing effects of prior discrimination. The cornerstone of this proposal is the transition class whereby students who meet the Court's criteria and who are unable to perform at grade level in the normal classroom setting will be placed in a transition class at the end of kindergarten and/or first grade. The students will stay in these half-step classes for one semester or the entire year, depending upon their needs. Here, pursuant to the Court's directive, adult-student ratios will be lowered, and the cost borne in part by decreased transportation costs associated with the K-4 schools having a neighborhood character.[16] Ms. Lucille Nabors, Assis-

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[16] In the Board's pleading accompanying their plan is the notation that on January 13, 1981, the Board of Education adopted a resolution made by Mr. George Cate and seconded by Mrs. Barbara Mann regarding funding of the educational components. This motion reads as follows: "I move that the Board adopt as a policy that to the extent that money is saved in 1981 and later years in transportation by adoption of the K-4 neighborhood plan, that such funds be applied to the educational component of the plan with priority to the K-4

tant Superintendent for Program and Staff Development, testified at length about these programs, and stated that they were ready for implementation in those elementary schools included in the approved interim plan, discussed *infra*. Other remediation programs planned by the staff include basic development curriculum in math, language arts, and reading. (Exhibits 277, 278, part 1, pp. D-1—D-4, and part 2).

The Plaintiffs filed only two objections relating to the intervention/remediation program. Specifically, plaintiffs argued that the program should not be limited to grades K-4, and that it should not be paid for with Title I funds. (Objection 1(d), March 25, 1981, and Objection 1(e), March 25, 1981). From the exhibits and from the testimony of Ms. Nabors, it is apparent that remediation efforts in the system are currently directed toward all grades. (See Exhibit 278, part 1, at D-1). However, the Court's Order was directed only to remediation in grades K-4, in order to maintain the delicate balance set forth in that Order.[17] Moreover, inherent in the Court's Order is the recognition that when remediation is effective in the lower grades, there should be less need for it in the upper grades.

Plaintiffs' objection regarding Title I funds is also not well taken. Ms. Lucille Nabors testified that the Defendants are cognizant of the Title I Regulations and statutes, which at this time appear to preclude the use of Title I funds for educational

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intervention-remediation program, and that the staff be directed to follow that policy and consider the specific guidelines set down by the Court in its opinion as budgets for the ensuing years are prepared and submitted to the Board."

[17] The neighborhood character of the K-4 schools will permit increased parental involvement in every school, a concept espoused by Dr. Hugh Scott and capitalized upon by the Board's proposal to provide parental training to increase support for target children. (Exhibit 278, part 1, at D-3—D-4).

components of court-ordered desegregation plans. The plans proposed by the Board for implementation under the Court's Order will be funded fully with state and local funds. In fact, those students the Plaintiffs would wish to receive remedial services will be receiving twice the amount of such services, from the local level and from the federal level.

The Court's Order of May 20, 1980, directed the Board to plan intercultural experiences for students in those schools which, because of the Court's cost-benefit analysis, would attend predominately one race schools. Based upon the testimony of Ms. Nabors, and the voluminous exhibits presented, the Court is satisfied that the Board has met this criteria, and has used its initiative to develop intensive programs which the professional staff deem valid and educationally sound.

Dr. Hugh Scott, the Plaintiffs' expert witness, testified at length about the trend toward and the need for multicultural education directed toward the recognition of cultural diversity in a pluralistic society. The multicultural committees have developed a detailed program along the lines of Dr. Scott's suggestion. This program will eventually be offered in every school, grades K-12. (Exhibit 278, part 1, A-4). A curriculum guide for grades K-6 has already been developed and will be ready for use in those grades in 1981-1982 (Exhibit 276). Ms. Nabors testified that a similar guide for grades 7-12 is to be developed in the near future.

An intercultural exchange program is also planned pursuant to the Court's directive for those K-4 schools that will be predominately one race. These programs must, of necessity, be tailored to the individual schools and staffs involved, and these programs will be operational in the predominately one race schools under the interim plan in 1981-82.

The Plaintiffs filed only one objection with regard to the multicultural-intercultural exchange program proposed by the Board, which objection was not specific in nature. Objection

1(a) (March 25, 1981) indicates that the Plaintiffs accept the goals and objectives of the multicultural program, but insist that sufficient detail was not supplied. The testimony of Ms. Nabors and exhibits previously mentioned satisfy the Court that the validity of the planned programs has been shown and that the programs are in full compliance with the Court's directives of May 20, 1980.

The magnet school proposal presented by the Board did not satisfy the Court's desire to have at least one such alternative program[18] implemented immediately. The delay was not based upon lack of curriculum development, since plans for an academic magnet school were well under way at the time this Court approved the Board's timetable for implementation of the plan on July 15, 1980. The Board felt the program should be delayed until a suitable building for such a 7-12 grade school could become available. This problem has been obviated by the adoption of the modified interim pupil assignment plan, discussed *infra*. The Court questioned Ms. Nabors at length about the time necessary to implement the planned academic magnet school for 1981-1982 in the event a suitable building could be found. While Ms. Nabors and her committees understandable felt that more time than is available between now and the beginning of school in the fall of 1981 would be preferable for the selection of staff and students, she did testify that the task could be completed. Based on that representation, and the desire of this Court to minimize the delay in implementing as much of this plan as possible, the Court now orders that the proposed academic magnet school, to be located at the present West End Junior High School, be implemented for the coming school year, beginning with grades 7 and 8, and adding a grade each year thereafter.

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[18] The Board's plan proposed to continue the operation of Hume Fogg High School as an open zoned school with grades 9-12 for the school year 1981-1982. This proposal includes the Board's intention to re-evaluate the continuation of Hume Fogg on an annual basis. This proposal is approved.

The Plaintiffs only objection to the magnet school proposal outlined by the Board is directed toward the student selection procedure to be employed for such school. While the Board did not intend to use its selection procedure for the coming year, the Court is impressed by the mechanism developed for such selection (Exhibit 274), which includes achievement test scores, teacher ratings, and school records. These criteria will insure sufficient flexibility to provide equal access to all races, contrary to the Plaintiffs' objection. This objection is accordingly overruled.

The Black History or Afro-American Studies Program ordered by the Court in its Order of May 20, 1980, is presently in operation, having been offered in the high schools for the first time in the fall of 1980. The Court finds the curriculum guide for this course to be most adequate. (Exhibit 275). This course, along with continuing efforts to include such studies in the regular curriculum and to screen curriculum and textbooks for sensitivity to the heritage of black Americans, and the muliticultural program for all grades discussed previously, complies with this Court's directive. The Plaintiffs' objection relating to the lack of specificity and to general curriculum considerations is overruled. (Objection 1(c), March 25, 1981).

The educational considerations inherent in the move toward middle schools pursuant to the Court's directive were addressed extensively by Ms. Nabors and set forth in the exhibits. (Exhibit 278, part 1, Section E). The implementation of the middle school philosophy with its emphasis on bridging the gap between elementary and high school should go a long way toward meeting this Court's directive to concentrate on quality education and to increase community perceptions thereof.[19]

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[19] No objections were filed by the Plaintiffs relating to the educational component for middle schools.

The final educational component ordered by the Court concerns in-service training of faculty and staff members for successful implementation of the plan. No pertinent objection has been filed by the Plaintiffs to this component.[20] From the testimony and the materials presented, this component is well developed, providing a continuation of the on-going "Together We Can ... Together We Will" program previously lauded by this Court, and for new programs related to the desegregation order. (Exhibit 278, part 1, pages G-1-H-30). It is, therefore, approved as complying with the Court's Order of May 20, 1980.

In view of the foregoing discussion and findings, the educational component package as presented by the Board, with the modification regarding the academic magnet school beginning with grades 7-8 in 1981-1982, is approved as complying with this Court's Order of May 20, 1980.

II. PUPIL ASSIGNMENT COMPONENT

Two proposals were made by the Board for pupil assignment, the long range plan for implementation in 1984, and the interim plan for implementation in 1981-1982. As detailed, *infra*, the long range plan is approved as in conformity with the Court's Order of May 20, 1981; the interim plan is modified to include an expanded zone of implementation for 1981-1982.

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[20] The Plaintiffs' only objection to the administrative and staff development portion of the plan relates not to the in-service educational component, but to affirmative action plans for staff and administrative positions. While this was part of the Court's Order of May 20, 1980, the Court has reserved the personnel issue for a later date, and accordingly, no proof has been presented by the Board regarding its affirmative action plans.

A. *The Long Range Plan.*

The Board's long range proposal for elementary schools, exhibits 268 and 271, fully complies with the Court's directive to establish a system of K-4 or K-5 elementary schools of a neighborhood character, all the while maximizing opportunities for integration in a neighborhood setting. Of the 75 K-4 elementary schools proposed, Mr. Osborne estimates that approximately 31 of these schools will be walk-in schools requiring no transportation, as compared to only five at the present time. This should permit increased parental participation deemed so important by this Court and by the Plaintiffs' own expert witness, Dr. Hugh Scott.

In drawing the school zone lines for elementary schools, Mr. Osborne and his bi-racial committee committed themselves to maximizing integration as much as possible without the use of non-contiguous zones, and the results were surprising. No K-4 school is projected to be 100% black, and only five schools in the outer reaches of the County are projected to be 100% white.[21] It should be noted here that while the Plaintiffs' plan was stricken from the record, it contained a proposal to leave some of these distant outlying schools untouched by the Plaintiffs' own desegregation plan. (*See,* Plaintiffs' Exhibit Number 284 for Identification).

Approximately 20 of the elementary schools are projected to be within the 15% black or white ratio established by the Court for middle schools. Those schools which fall outside this percentage will benefit from the intercultural exchange program discussed above.

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[21] Gateway, Hickman, Joelton, Sylvan Park, and Union Hill. (Exhibit 268).

The Court is satisfied that the elementary school plan meets the Court's Order of May 20, 1980, and all the Plaintiffs' objections relating to it have no bearing on the question of compliance with the Court's mandate.[22]

The middle school plan approved by the Board contemplates the creation of 24 middle schools serving grades 5-8 in 1984. (Exhibits 268 and 269). According to the testimony of Mr. Osborne, the Board began its consideration of the middle school plan by locating suitable buildings for the unique middle school program, as outlined by the Middle School Educational Component Committee.

After the schools were selected, zones were constructed to comply with the Court's mandate to achieve at minimum a 15% representation of either race in the middle schools. Under the Board's proposal, four middle schools are not projected to fall within this 15% black/white range in 1981: Donelson (14.8% black), Apollo (14.1% black), Antioch (14.0% black), and Wright (11.7% black). These schools may well fall within the 15% range by 1984, and to require their technical compliance with the suggested ratio at this time would necessitate the rezoning of black children from neighborhood middle schools into these middle schools. In drawing the middle school zones, the Board used non-contiguous zones only where necessary, and as demonstrated by Mr. Osborne, chose the closest other race population to constitute the non-contiguous zones wherever practical.

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[22] Plaintiffs' Objection (3)(a) (February 6, 1981) and Objection 2 (March 25, 1981) attack the neighborhood character of the elementary school proposal. Again, this constitutes an attack on the Court's Order rather than an effort to achieve complance with it. Accordingly, these objections are stricken under Rule 12(f), Federal Rules of Civil Procedure, along with the Plaintiffs' elementary school plan.

Plaintiffs only objection to the Board's middle school proposal is that the burden of transportation continues to be on the black children. The middle school map (Exhibit 269), and the testimony of Mr. Osborne, demonstrate conclusively that this is not the case. In many instances, white children are required to travel to predominately black communites to attend school. For example, white children in the outer reaches of the County are required to travel to the predominately black innercity to attend Cameron; white students from the southern portion of the Pearl zone are required to travel into the innercity to Pearl; white students are required to travel into Ewing Park; and white students are required to travel into Cumberland. Merely because there may be more non-contiguous zones made up of predominately black children does not mean that these students must travel longer distances or greater lengths of time than white children, nor does it mean that these students must necessarily travel out of their neighborhoods more often than white children. The Court finds that the locations of the middle schools were chosen by a neutral process, in an effort by the Board to accommodate the unique middle school program at the best possible places, thereby looking forward to the enhancement of quality education. The amount of transportation involved for either race is necessary to reach the 15% representation level deemed desirable by the Plaintiffs' expert witness, Dr. Hugh Scott and approved by the Court in its Order of May 20, 1980.

In addition, Plaintiffs'objection regarding burden on black students at the middle school level constitutes not an objection, but an admission that the Plaintiffs' proposed plan does not comply with the Court's Order. Plaintiffs used the same middle schools in their proposed plan that the Board has used under its plan. (Exhibit 283). It is inconceivable that their objections regarding burden on black children can be alleviated by their plan because there are no additional middle schools in the black

community. When this obvious concept is coupled with the racial balance approach used by the Plaintiffs, which will require transportation of greater numbers of black children out of the black community, it is apparent that the burden on black students is increased in the Plaintiffs' plan contrary to the basic concepts of the Court's Order.

The Board's high school plan (Exhibits 267 and 268) is also in total compliance with the Court's directive of May 20, 1980. Bellevue and Joelton were closed as high schools in the school year 1980-81, with the high school population of these schools being reassigned to Hillwood and Whites Creek pursuant to the Court's directive. The long range proposal for 1984 forecasts the closure of Antioch, DuPont, Pearl, Cohn, and Goodlettsville as high schools, with their school populations being accommodated by the Goodlettsville-Madison, Pearl-Cohn, McGavock, Glencliff and Overton zones ordered by the Court.

The only deviation from the plan contemplated by the Court and the Board's new plan concerns Goodlettsville-Madison. Since the early 1970's, the Board has proposed to build a new Goodlettsville-Madison-Trinity Hills Comprehensive High School at the Hunter's Lane location. Upon reconsideration of this proposal following the Court's Order, the Board determined that it would be more economically responsible to expand the existing Madison High School to accommodate students from the Goodlettsville, Madison, Trinity Hills, and DuPont areas at a savings in excess of $2,000,000.00. (Board Minutes, Exhibit 286). The testimony of Mr. Osborne indicates that the locations make little difference to the student populations involved. If anything, the Madison location is slightly closer to the highest concentration of black students for the school population in the Trinity Hills area than was the Hunter's Lane location and the racial makeup of the school is not affected by a change in location.

The Ford Greene site chosen for the Pearl-Cohn Comprehensive High School is also approved as a central location in the proposed zone, taking into account the relative concentration of students in that zone.

It should be noted here that while the Court did not decree the racial mixture in the high schools as it did in the middle schools, all of the Board's proposed high schools, with the possible exception of Goodlettsville-Madison at 14.9% black, fall well within the 15% either race guideline established by the Court for middle schools. Furthermore, three of the 10 schools are projected to be majority black in 1984.[23]

The Plaintiffs only objections to the high school plan concern the Board's failure to consider the pairing of Maplewood and Goodlettsville in lieu of building the Goodlettsville-Madison Comprehensive High School, and its failure to use Pearl as a high school. (Objection 3(b) (February 6, 1981), and Objection 2(b) (March 25, 1981)). Both of these objections are without merit. The Maplewood objection attacks rather than follows the Court's Order of May 20, 1980, and accordingly, it should not be considered. The soundness of the Board's action in converting Pearl to a middle school is supported by the fact that the Plaintiffs' plan also uses Pearl as a middle school, rather than a high school. (Exhibit 283).

In view of this discussion, the Board's long range pupil assignment plan is approved in its entirety as in compliance with the Court's Order of May 20, 1981.

B. *The Interim Plan.*

The Board's interim plan for implementation in the fall of 1981 proposes to implement the Court's Order of May 20, 1980,

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[23] Maplewood, Pearl-Cohn, Whites Creek.

in only one area of the county—the area encompassed by the Whites Creek Comprehensive High School zone (Map, Exhibit 272, and statistical summary, Exhibit 272). Insofar as this plan goes, this portion of the interim plan is approved, including the minor deviations from the long range plan requiring the phasing in of certain zones over the next three years.[24]

In 1981, implementation of the plan in the northeastern section of the County will involve eight elementary schools serving grades K-4, three middle schools serving grades 5-8, and one comprehensive high school.

At the time this plan was filed, the Court was concerned that more of the County could not benefit from the early implemen-

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[24] As Mr. Osborne testified, the Whites Creek zone, as shown on the 1984 long range map, can be implemented in 1981, with a few minor exceptions. These exceptions relate to building capacity. Whites Creek can accommodate the Union Hill zone (now in Goodlettsville), the Brick Church zone (now in Maplewood), and the Haynes Manor area (now in Maplewood) in 1984, because of projected declines in enrollment. However, during the interim, only one grade a year from those areas can be added to Whites Creek. Therefore, beginning with the ninth grade in 1981, adding the tenth grade in 1982, and so on, the interim plan proposes to stagger the implementation of the long range plan in this area. The procedure will not only direct itself toward building capacity, it will also facilitate as little disruption of students as possible, since students who begin the ninth grade at Maplewood and Goodlettsville in 1980-1981 will be permitted to graduate from those schools.

The zones for the three middle schools, Joelton, Ewing Park, and Cumberland, will be implemented in 1981, with the exception that children in the Parkwood Estates area will continue to attend Ewing Park until 1984, when they are scheduled to attend Goodlettsville, and students from the Haynes area will continue to attend Meigs and Highland Heights until 1984, when they are scheduled to attend Ewing Park. These deviations are necessary because of capacity problems that will be alleviated in 1984 by virtue of the construction of a new high school to serve the Goodlettsville-Madison-Trinity Hills-DuPont area.

tation of the three-tiered grade structure from intervention/remediation and from the magnet school proposal until 1984. Accordingly, on March 31, 1981, the Court directed the Board to present further alternatives for increased implementation of the plan on April 6, 1981.

In directing the Board to consider other alternatives for implementation of the plan, the Court was not attacking the Board's good faith efforts in deciding not to implement the plan further. As was stated by Mr. Osborne, the rationale behind the slow implementation was that until the two new comprehensive high schools were built, any rezoning of students could be made on a temporary basis only. To avoid temporary disruption of students on this basis, the Board decided to make such changes only where permanent assignments could be made, and this could only be accomplished in the Whites Creek zone. While understanding this rationale, this Court deems the benefits to be achieved by the earlier implementation of the plan to far outweigh the minor disruptions occasioned by a stepped-up timetable.

After the Court's directive to the Board to develop an alternative proposal, the Board reported to the Court a proposal to implement the new plan insofar as possible in the southeast sector of the city in addition to the northeast sector.[25] This proposal would involve the rezoning of Cohn and Pearl High School students to Hillsboro and Hillwood for the interim period beginning 1981-1982, pending the completion of the Pearl-Cohn Comprehensive High School in 1984. This move would free Pearl and Cohn for immediate use as middle schools, pursuant to the Board's plan, and would also free West End for immediate use as an academic magnet school in 1981-1982. Elementary school zones for this interim plan have not yet been

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[25] This proposal was attached to the interim plan map in the form of an overlay on Exhibit 272 and is described on Exhibit 279.

finalized, and some flexibility will be necessary, especially on the outer fringes of the southeast sector. This Court is assured that this planning can be completed well in advance of the approaching school year, and that the appropriate educational components can be in place for this sector just as they will be in place in the northeastern sector. Accordingly, the revised interim plan is approved.

It should be noted here that to complete the plan in the remaining sections of the County will require the construction of the Goodlettsville-Madison Comprehensive High School and a sufficient decline in enrollments at Glencliff, McGavock, and Overton, thus permitting the reassigning of students from Antioch High School and Dupont pursuant to the Court's directive. Accordingly, pending such events, attendance patterns in this section of the County should remain as they are.

ADDITIONAL MATTERS

After many days of testimony in this cause, it has become apparent to this Court that the rigid guidelines placed upon the school system by this Court's Order in 1971 have become obsolete and no longer necessary. The good faith efforts of this Board to achieve desegregation have been amply demonstrated by all the plans submitted to this Court. This Court does not deem it necessary to impose further rigid guidelines upon the Board in terms of minor alterations in zone lines where deemed advisable to achieve better integration or to conform to building capacities. In addition, in view of the new plan now approved, the restriction placed upon building in the outlying areas by the 1971 Order no longer has validity, since the new plan addresses desegregation and quality education on a county-wide basis. Accordingly, the ban on such construction, where deemed necessary by the Board to improve facilities, accommodate students, or enhance integration, should be lifted.

An appropriate Order will enter. This is a final order from which an appeal as of right is provided by Rules 3 and 4, Fed. Rules App.Proc. Because efforts at implementation for the school year 1981-82 are immediately imperative, this Court will not grant a stay of this order pending any appeal.

SUPPLEMENTAL APPENDIX E

No. 81-5370
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert W. Kelley, et al.; Henry C. Maxwell, Jr., et al,
Plaintiffs-Appellants,

vs.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee,
Defendants-Appellees.

ORDER

Before: EDWARDS, Chief Circuit Judge, JONES, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

On receipt and consideration of a motion for stay filed by Robert W. Kelley, et al., plaintiffs-appellants; and

On consideration of said motion under terms of Rule 8 of the Rules of Appellate Procedure and pertinent case law, *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n,* 259 F.2d 921, 925 (D.C. Cir. 1958); *see also North Avondale Neighborhood Ass'n* v. *Cincinnati Metropolitan Housing Authority,* 464 F.2d 486, 488 (6th Cir. 1972); and

Further noting that generally four factors are required for the issuance of a stay, as follows:

1. Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?

2. Has the petitioner shown that without such relief, it will be irreparably injured?

3. Would the issuance of a stay substantially harm other parties interested in the proceedings?

4. Where lies the public interest?

Observing from this record that affirmative answers favorable to plaintiffs' motion must be given in relation to the first two of these questions, while a negative answer appears appropriate to the third;

And concluding as to the fourth question that where (as here) after many years a final school desegregation order has been entered in the District Court, appealed to this court and affirmed, and then appellants' petition for certiorari has been denied in the Supreme Court, it is in the public interest for a proposed departure from said order to be reviewed by the Court of Appeals prior to, rather than after, the institution of the change sought;

Now, therefore, plaintiffs' motion for stay is hereby granted, the mandate is ordered issued forthwith, and the appeal is expedited for hearing in the October term of this court.

Entered by order of the Court

/s/ JOHN P. HEHMAN
Clerk

SUPPLEMENTAL APPENDIX F

Supreme Court of the United States
Washginton, D. C. 20543

Chambers of
Justice John Paul Stevens

August 20, 1981

IN CHAMBERS MEMORANDUM OF JUSTICE STEVENS

Re: No. A-144 Metropolitan County Board of Education, et . al., v. Kelley, et al.

Pursuant to the rules of this Court, the motion of the Metropolitan Nashville Board of Education to vacate the stay entered by the United States Court of Appeals for the Sixth Circuit on August 19, 1981, has been referred to me for decision. The movants have persuaded me that I have jurisdiction to vacate the stay entered by the Court of Appeals, but for the following reasons I have decided not to do so.

The district court order of April 17, 1981, that has been stayed by the Court of Appeals substantially modifies the desegregation order that had previously been in effect in Davidson County, Tennessee. The plaintiffs filed an appeal from that order and, after hearing oral argument in connection with the plaintiffs' application for a stay, the Court of Appeals expressed the opinion that the changes in the prior order are of sufficient significance that they should be reviewed by an appellate court before they are implemented. I share that opinion.

Although, as the Board of Education has pointed out, the stay will cause significant expense and inconvenience to the community, because the interim order will affect 21 elementary

schools, six middle schools and three high schools immediately, and also will have an impact on the permanent plan scheduled to go into effect in 1984, it seems to me that even greater inconvenience might result if the plan were to go into effect forthwith and be modified or set aside at a later date when the Court of Appeals reviews its merits. The Court of Appeals has greater familiarity with the case than it is possible for me to have in the brief time I have had to examine the papers that have been filed with me; for the purpose of my action I accept the correctness of that court's determination that there is a likelihood that plaintiffs will prevail on their appeal. If that be so, it seems to me that in the long run there will be less inconvenience and hardship to all parties if appellate review is had prior to the implementation of the interim order of the district court. Accordingly, the motion of the Board of Education to vacate the stay is denied.

SUPPLEMENTAL APPENDIX G

MEMORANDUM OPINION

(Filed June 28, 1971)

History of Litigation

The original action seeking school desegregation of the Nashville school system was filed in September, 1955.[1] Finally, on July 16, 1970, after the gradual evolvement of the present status of the law, this United States District Court, speaking through the Honorable William E. Miller, held that the local school board had not met its affirmative duty to abolish the dual school system in three categories: pupil integration, faculty integration, and site selection for school construction. *Kelley* v. *Metropolitan County Board of Education*, 317 F. Supp. 980 (M.D. Tenn. 1970). The approval and implementation of a plan to correct the adjudicated wrongs was delayed until the Sixth Circuit Court of Appeals ordered immediate hearings for that purpose.

Background Data

The Metropolitan school system consists of three divisions. The elementary schools accommodate students from kindergarten through the sixth grade. Junior high accommodates grades seven through nine. Senior high consists of grades nine through twelve.

In the 1970-71 school year a total of 94,170 students attended the Metropolitan schools. Of this number, 33,485 were transported by the Metropolitan school system. Of the total transported, less than 4,000 were black and approximately 30,000 were white.

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[1] Reference to the separate and later consolidated actions regarding the City of Nashville and Davidson County systems is omitted for brevity.

One hundred forty-one schools were operated in the Metropolitan school system during the 1970-71 school year. The racial breakdown of the students was:

black	23,533
white	71,754
other	237

The percentage breakdown was:

black	24.63%
white	75.12%
other	.25%

Plans Submitted for Court Approval

School Board Plan

The Board of Education submitted a plan for pupil integration in August, 1970. Included in this plan was a policy statement that the school board "accepts as an ideal student racial ratio of an integrated school as one which is 15% to 35% black."[2]

The August, 1970 plan made 49 minor geographic zone changes, and provided for the transportation of an additional 1162 pupils.[3] The result of the plan was to leave the elementary schools significantly unchanged. Six of the 38 high schools and junior high schools would remain at least 50 per cent black. Fifty-seven per cent of the black high school and junior high

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[2] The testimony of expert witnesses indicates that the accepted and satisfactory norm is a range from 10 per cent below to 10 per cent above the percentage of black students enrolled in a school system.

[3] McGavock, a recently erected high school, was not included in the August, 1970 plan.

school students would attend these six schools. The racial composition of two schools would be at least 95 per cent black and four other schools would be at least 90 per cent black. This would result in 47 per cent of the black students attending schools where the composition would be above 90 per cent black. Eight schools accommodating 20 per cent of the black students, would operate with 15-35 per cent black students. Fifteen schools would operate with 95 per cent or above white students.

On the last day of the hearings, which were held on several days over a three-month period, the school board submitted an amendment providing for the selection of students for McGavock School by paring.

Plaintiffs' Plan

Elementary Schools. Plaintiffs, through clustering and pairing, using both contiguous and non-contiguous zoning, proposed to effect in most elementary schools, through two alternate plans, a mathematical ratio in the range of 15-35 per cent black. Plan I would require the transportation of 25,500 elementary students, and Plan II would require the transportation of 27,000 pupils. Eighty-two of 100 schools would fall within the ideal ratio under Plan I, while under Plan II, 91 schools would attain the indicated ratio.

Secondary Schools. A model was submitted which included sectoring, clustering and pairing to attempt to attain 15-35 per cent black in the junior and senior high schools. In both the elementary and secondary school plans there is not a satisfactory description of grade organization, structuring of the schools, the assigment of the pupils, or definite zone description. The plans propose the mathematical result indicated, but delegate to the school board the actual assignment of pupils and implementation of the plan.

HEW Plan A as Amended[4]

At the request of the Court, the Department of Health, Education and Welfare submitted a plan with two alternates. The principal plan was designated as Plan A. This plan incorporates geographic zone changes, clustering, pairing (both contiguous and non-contiguous), and grade restructuring.

Elementary Schools. Five schools would be closed.[5] Seventy-four schools would have a racial percentage of 16-41 per cent black. Twenty-two schools which are located in the far reaches of the county would have a racial percentage of 0-11 per cent black. Three of those 22 would have no blacks. Under Plan A there would be no elementary school in the system with a black student enrollment of more than 41 per cent. Fifty-nine per cent of the black students in the system would attend schools with a black student enrollment of between 35 and 41 per cent. Three per cent of the black students in the system would attend schools with a black student enrollment of less than 15 per cent. Twenty-four per cent of the total number of white students in the system would attend schools in which black enrollment is less than 5 per cent. One per cent of the total black student enrollment in 16 schools, or 125 students, would be enrolled in schools with less than 5 per cent black student enrollment.

Under this plan, approximately 22,000 elementary school students would be eligible for school-provided transportation. This is approximately 10,500 more than the Board transported

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[4] Adjustments were made to shorten transportation routes, to incorporate the school board plan for McGavock School, to adjust the student makeup of Pearl High School.

[5] Three of the five schools to be closed are rated unsatisfactory by the consultants hired by the school board. The other two are listed as inadequate.

in 1970-71, and 9,700 more than those who would be transported under the Board's proposed plan. Three thousand five hundred fewer students would be transported under HEW Plan A than under the plaintiffs' Plan I, and some 5,000 fewer than would be transported under plaintiffs' Plan II.

Junior High Schools. This plan incorporates the school board amendment to the August, 1970 plan. Eighteen of 25 schools would have a racial composition of 20-40 per cent black. Seven schools would have a composition ranging from 0-5 per cent black. These seven schools are in the outer reaches of the county. Some former senior high schools would be changed to junior high schools. Two high schools would be closed.

Senior High Schools. This plan incorporates the school board amendment to the August, 1970 plan. Central High School would be closed. MaGavock High School is to be opened. Of the 18 schools, 11 would have 18-44 per cent black. One would have an 11 per cent enrollment of blacks and six would be virtually all white. These all-white schools are located in the outer reaches of the county.

An analysis of the HEW amended plan with regard to the secondary schools reflects that:

(1) no school would operate with more than 44 per cent black;

(2) 29 of the 43 schools would operate within the range of 15-44 per cent black, with one additional school having 11 per cent black;

(3) 13 schools, primarily in the outer reaches of the county, would have 95 per cent or more white;

(4) 67 per cent of the schools, housing 90 per cent of the black students, would operate in the 15-44 per cent black range;

(5) transportation would be required for 26,673 junior and senior high school students; and

(6) including the transportation necessary for McGavock School, 2,838 more secondary pupils would require transportation than were transported in the 1970-71 school year.

Objective, Test, and Methods

Objective

> "The objective today remains to eliminate from public schools all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education,* ... U.S. ..., 28 L.Ed.2d 554, 566 (April 20, 1971).

The Supreme Court has stated that "[t]he objective is to dismantle the dual school system," *Swann, supra,* at 573, ". . . to eliminate invidious racial distinctions," *Swann, supra,* at 568, and ". . . to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners,* ... U.S. ..., 28 L.Ed.2d 577, 581 (April 20, 1971).

Test

A plan "that promises realistically to work, and promises realistically to work *now*" is required. *Davis, supra,* at 581, quoting *Green* v. *County School Board,* 391 U.S. 430 (1968). A plan "is to be judged by its effectiveness." *Swann, supra,* at 572; *Davis, supra,* at 581. A plan "is not acceptable simply because it appears to be neutral." *Swann, supra,* at 573.

Methods to Accomplish Objective

The following methods have been acknowledged by the United States Supreme Court: (1) restructuring of attendance zones, both contiguous and non-contiguous; (2) restructuring of schools; (3) transportation; (4) sectoring; (5) non-discriminatory assignment of pupils; (6) majority to minority transfer; and (7) clustering, grouping and pairing. *Swann, supra; Davis, supra.*

Discussion of Plans Submitted

The pupil integration plan submitted by the school board, viewed in the most favorable light, constitutes mere tinkering with attendance zones, and represents only a token effort. It clearly falls short of meeting the objectives and tests set out in the decisions of the United States Supreme Court. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra; Davis* v. *Board of School Commissioners, supra; Green* v. *County School Board,* 391 U.S. 430 (1968). In effect, the defendant has made no effort to meet its affirmative duty to establish a unitary school system "in which racial discrimination would be eliminated root and branch."[6] *Green* v. *County School Board, supra,* at 437-38; quoted in *McDaniel* v. *Barresi,* ... U.S. ..., 28 L.Ed.2d 582, 585 (April 20, 1971).

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[6] Based on defendants' school statistics for 1969-70, the student enrollment was 95,789. The total majority to minority rezoned under this plan is:

Elementary		
whites gained in black schools	301	
blacks gained in white schools	457	
	758	majority to minority transfer in elementary
Junior High		
whites gained in black schools	430	
blacks gained in white schools	400	
	830	majority to minority transfer in junior high
Senior High		
whites gained in black schools	73	
blacks gained in white schools	735	
	808	majority to minority transfer in senior high

Since the defendants have, in effect, failed to submit a constitutionally sufficient plan, the Court must examine the other plans. The plaintiffs' plans as to elementary schools are adequate in one respect. Under Plan I, 82 out of 100 schools would be within the indicated range of 15-35 per cent black, which was set by the school board. Plan II would satisfy this standard in 91 out of 100 schools. This plan, however, has two features which are objectionable to the Court. The first is that actual assignment of students, i.e., the locations from which they come, is left to the school board. The historical reluctance by the school board to solve this problem instills a lack of confidence in their implementation of this aspect without close supervision. The second objection is that some schools in the outer reaches of the county are included. The Court finds that costs and other problems incident to transportation make this feature of plaintiffs' plan impractical and not feasible.

Each and every school is not required to be integrated. The test is a unitary school system. *Swann, supra.* The practicality and feasibility of a plan is a material consideration. *Swann, supra.*

The cost of the transportation of students and the unnecessary disruption of the students are proper considerations. The Court finds that distance and transportation difficulties make the integration of these schools highly impractical.

Plaintiffs' plan for the desegregation of secondary schools, as in their elementary plan, was a model using sectoring, zoning (contiguous and non-contiguous), and pairing to accomplish the indicated racial balance. In neither the elementary plan nor the secondary model is there a description of grade organization, structuring of the schools, the assignment of pupils, or proper description of zoning. For the reasons set forth as to the elementary school programs, the secondary school plan of the plaintiffs is rejected.

The plans of the plaintiffs and defendants being rejected for the reasons stated, the HEW plan is the only realistic plan remaining before the Court. As a result of the evidence produced at the hearing, the HEW plan was amended to effect the following changes:

(1) adjustment of the black percentage at North High School from 65 per cent black to 44 per cent black, and the reduction at Pearl High School to 33 per cent black, with corresponding adjustments in Stratford, Maplewood, and other schools;

(2) shortening the time of transportation of certain pupils; and

(3) incorporation of the McGavock High School phase of the defendants' amended plan.

On the last day of the hearings, the defendants presented an amendment to its August, 1970 plan. This amendment provided that McGavock would be a comprehensive high school serving an area where several junior high schools are located. Although this amendment applied only to a small sector of the secondary school system, it reflected the beginning of an awareness by the defendants of their affirmative constitutional responsibility. The defendants indicate a desire to make similar proposals in the future, which desire the Court wishes to encourage. If the Board of Education had genuinely wished to establish a unitary school system, it had available to it the superior resources and assistance to do so.

The realistic and effective approach of the defendants to the McGavock School area was incorporated as an amendment to the HEW plan, despite the fact that it requires more transportation, over longer distances, than was required by the original HEW plan. The Court feels that where administrative goals can be satisfied without hampering the constitutional objectives to be accomplished, such goals should control.

Action of the Court

The Court hereby adopts the HEW Plan A as to elementary schools. This plan utilizes all of the methods previously enumerated. The map showing the georgraphic zones is on file with the clerk. This map also reflects the zoning, pairing and clustering to be employed. The charts appearing at pages 34 through 41 of the HEW plan, as filed with the clerk, are adopted as a part of said plan and will be followed in the implementation thereof.

Simultaneously with this Memorandum Opinion, the Court has filed maps showing the geographic zones of the junior and senior high schools. Likewise, charts are filed titled Table 1, Senior High Schools, and Table 2, Junior High Schools. These charts will be followed in the implementation of the plan.

In the implementation of the plans, the transparent maps can be placed as overlays on the student locator map. Thus the georgraphic boundaries of the zones become clear. In effect, the Court is providing the defendant school board a map overlay for each of the grade divisions, namely the elementary schools, the junior high schools, and the senior high schools. These overlays indicate grade and school groupings, where such are made, and approximate areas for attendance. Accompanying tables show the approximate numbers of pupils involved. The responsibility for determining the precise boundary lines is placed upon the defendant Board of Education. A written description of such boundaries, together with tables showing approximate numbers of pupils by race in each school, shall be filed with this Court by August 1, 1971. The defendant Board of Education may make minor alterations in boundaries provided such alterations do not lessen the degree of desegregation in the plan ordered by the Court.

The Court is aware that the cost of implementing any plan is a major concern. Much proof was introduced as to the financial

impact of any plan which requires transportation. Since the defendants have consistently transported large numbers of students to promote segregation, some adjustment must be made to reverse this unconstitutional practice. Practical solutions are available, such as the multiple use of buses, staggered hours for school opening, and staggered hours for individual grades.

> "We do not read *Swann* and *Davis* as requiring the District Court to order the Board to provide extensive transportation of pupils to schools all over the city, regardless of distances involved, in order to establish a fixed ratio in each school." *Northcross* v. *Board of Education*, Civil Nos. 20,533, 20,539 (6th Cir., filed June 7, 1971).

This order does not contemplate cross-transportation of pupils within a grade level in implementation of this order. If such crossing occurs, the Board may make minor adjustments in zones or may make application to the Court for reconsideration of the zones. It is further contemplated that the transportation routes in the plan implemented by this order permit uninterrupted transportation of children from home pickup points to and from the school attended. This is not to preclude the Board in the exercise of administrative discretion and consideration of transportation economics, from establishing transfer routing and collection points.

The Court is aware that some "all-white" schools remain in the outlying areas of the county. However, based upon practical considerations, common sense and judgment dictate that they should not be integrated. Integration of those particular schools would not be feasible, both from a distance and a cost standpoint. However, to prevent the use of these schools as an avenue of resegregation, certain restrictions on their use will be hereinafter set forth.

Special Provisions

Majority to Minority Transfer Policy

After this plan is implemented, there will be no schools which have a majority of black students. Because of population changes or other circumstances, however, this situation might occur in the future. Therefore, the following policy shall be a part of the plan to be implemented.

Whenever there shall exist schools containing a majority of black students, this school board shall permit a student (black or white) attending a school in which race is the majority to choose to attend the closest school where his race is a minority. The Board of Education will provide all such transferring students free transportation and will make space available in the school to which he desires to move. The Board will notify all students of the availability of such transfers.

Faculty Integration

On July 16, 1970, Judge Miller in this case stated:

> "It is well recognized that faculty and staff integration is 'an important aspect of the basic task of achieving a public school system wholly free from racial discrimination.' United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969); *see* Bradley v. School Board of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965). In order to implement this mandate, the Court concludes that in the instant case faculties must be fully integrated so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio of black to white teachers in the system as a whole. Robinson v. Shelby County Board of Education, *supra;* Nesbit v. Statesville City Board of Education, 418 F.2d 1040 (4th

Cir. 1969); Stanley v. Darlington County School District and Whittenberg v. Greenville County School District, 424 F.2d 195 (4th Cir. 1970); Pate v. Dade County School Board, 307 F. Supp. 1288 (S.D. Fla. 1969); *contra,* Deal v. Cincinnati Board of Education, *supra. But see* Goss v. Board of Education of the City of Knoxville, 406 F.2d 1183 (6th Cir. 1969)." *Kelley* v. *Metropolitan County Board of Education, supra,* at 991.

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"It is the conclusion of the Court that the present policy of faculty desegregation applied by defendant is constitutionally inadequate. That policy must be altered to comply with the standards set forth above. A similar policy also must be applied to all other personnel employed by defendant school board." *Kelley* v. *Metropolitan County Board of Education, supra,* at 992.

The court-required ratio for teachers in each school was fixed at that time to be 80 per cent white to 20 per cent black. Approximately 94 schools are not currently operating at this ratio. In most schools, this ratio could be accomplished by moving one or two teachers. Upon the implementation of the plan presently adopted by the Court, there should be no difficulty in meeting the court order of 1970. Therefore, the defendants are required to effect said ratios for the next school year beginning on or about September 1, 1971.

The school board shall immediately announce and implement the following policies:

1. The principals, teachers, teacher-aides, and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. The school board shall, to the extent

necessary to carry out this desegregation plan, direct members of its staff to accept new assignments as a condition to continued employment.

2. Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.

3. If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school system which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school system. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school board. The school board also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

"Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held

previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general, depending upon the subject matter involved, five years is such a reasonable period.

Construction, Renovation and Location of Schools

On July 16, 1970, the United States District Court stated:

"The constitutional requirement of desegregation also finds application in the area of construction, renovation, and location of schools. School boards are required consciously to plan school construction and site location so as to prevent the reinforcement or recurrence of a dual educational system. *See, e.g.*, Felder v. Harnett County Board of Education, 409 F.2d 1070 (4th Cir. 1969); Swann v. Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1291, 1299 (W.D. N.C. 1969); Pate v. Dade County School Board, 307 F. Supp. 1288 (S.D. Fla. 1969). Courts may properly restrain construction and other changes in the location or capacity of school properties until a showing is made that such changes will promote rather than frustrate the establishment of a unitary school system. This Court in the past has stated that school boards may be enjoined from planning, locating or constructing new schools or additions to existing schools in such manner as to conform to racial residential patterns or to encourage or support the growth of racial segregation in residential patterns. Such operations, rather, are to be conducted 'in such manner as to affirmatively promote and provide for both the present and future an equitable distribution of racial elements in the population of each School System.' Sloan v. Tenth School District of Wilson County, Civ. No. 3107 (M.D. Tenn., Oct. 16, 1969).

"Looking to the facts of the instant case, it becomes apparent that defendant's decisions on the site selection and construction of its newest schools were not designed to promote desegregation. Since 1963, defendant has built four new elementary schools (Dodson, Granberry, Lake View, and Paragon Mills), eight new junior high schools (Apollo, Bass, Ewing Park, McMurray, John T. Moore, Neely's Bend, Rose Park, and Wright) and one new high school (Dupont). Of these 13 schools, Rose Park, with an enrollment of 527 black students and 11 white students, is virtually all-Negro. The remaining twelve schools, however, are, on the average, 97% white, with none having a black enrollment as high as 10%. Three elementary schools (Cora Howe, Fall-Hamilton, and H. G. Hill) and one high school (McGavock) are currently under construction. Enrollment estimates indicate that all of these schools will be predominately white.

"Seven elementary schools, two high schools, and one school for the physically handicapped are currently in the planning stage. The two high schools are being planned for predominantly black residential areas, thereby assuring predominantly black student bodies. Five of the seven elementary schools are to be constructed in virtually all-white residential areas, while the remaining two are projected for location in all-black or predominantly black residential areas. Thus, from the foregoing, it is apparent to the Court that defendant must consider making substantial alterations in its school construction policies in order to comply with constitutional requirements.

"The Court is of the opinion that the following course of action must be taken by defendant. First, those new schools on which construction work was actually in pro-

gress as of November 6, 1969,[13] may be completed. Though this action may not produce an ideal result in light of the goal of integration, it will prevent unnecessary economic waste. Also, since, these new schools will be subject to the same zoning policies prescribed above, their segregative influences should be lessened. Second, in instances where actual construction had not begun as of November 6, 1969, defendant must revise its plans where necessary in relation to these proposed schools so as to find a location that will maximize student integration. Finally, in the future all construction plans as well as plans for closure of old schools must be governed by the principles stated herein. The purpose of the Court in making such a requirement is to insure that such plans will serve the purpose of establishing a unitary school system. *See* Sloan v. Tenth School District of Wilson County, *supra*." (Footnote omitted.) *Kelley, supra,* at 992-93.

New Construction. The Board has proposed for approval the erection of two comprehensive senior high schools, one in the Joelton school area, and the other in the Goodlettsville area.

In connection with future planning, the Board employed a team of consultants to evaluate the existing school structures and to project the location of new structures. Prior to the submission of these recommendations, the Court requested, and two administrators of the Board located on a map, the ideal locations for comprehensive schools. When the team of consultants later made its report, their projections generally agreed with those of the school administrators. They found that new comprehensive schools should be located in the general area of

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[13] This is the date of the Temporary Restraining Order issued by this Court to enjoin defendant from further construction, expansion, or closure of schools pending the outcome of this suit."

the proposed inner-city expressway loop known generally as "Briley Parkway." The reason for this agreement is obvious when the pupil locator map is examined. Briley Parkway is generally the divider between the inner-city pupils and the outer-county pupils. It is roughly the half-way division. By the establishment of schools in this area, the integration of schools would be effected naturally and thereby minimize transportation.

Therefore, the Court finds that the erection of a comprehensive school in the Joelton area, with geographic zones drawn in accordance with the testimony in court, will maximize student integration. Upon submission of proper zoning and pupil assignment, this construction will be approved.

The proposed Goodlettsville school, a comprehensive high school, is located in an all-white community and is not located near the dividing line between inner-city population and outer-county population. By referring to the pupil locator map, it clearly appears that the erection of this school would tend to promote segregation. Thus the erection of this school in its proposed location is hereby enjoined. If the Board desires to establish another comprehensive high school, subsequent court approval may be obtained by submitting an appropriate location and proper geographic zones, which will achieve and perpetuate integration.

Another proposal is the erection of a school for the physically handicapped at 2500 Fairfax Avenue. This facility is to be erected near Vanderbilt University. The availability of professional services from Vanderbilt University and Vanderbilt Hospital is stressed. The plaintiffs assert that said project should be located in a "halfway" position between Vanderbilt University, MeHarry Medical College, and Fisk University.

The Court feels that the facility will have little, if any, effect on achieving a unitary school system. This Court will not

substitute its judgment for that of the Board, and the Board's proposal is approved.

Additions and Renovations. An application has been made for permission to acquire additional property for Hillsboro School so as to transform Hillsboro into a comprehensive high school. This application is denied for the same reasons that the Goodlettsville school was not approved.

Protable classrooms, referred to generally as "portables," have been used by the Board to house students in schools which were all-white or had received only token integration when there were vacant rooms in predominantly black schools. In effect, portables have been used to maintain segregation. In the future, portables shall be used only to achieve integration and the Board is hereby so enjoined.

In the plan adopted by the Court, certain schools in the outlying areas of the school district remain virtually all white. By reason of the past conduct of the Board the Court hereby sets forth the following restrictions to prevent these schools from becoming vehicles of resegregation. It is ordered that the schools, which have less than 15 per cent black pupils after the implementation of the plan, shall not be enlarged either by construction or by portables, and shall not be renovated without prior court approval. Furthermore, no additional schools shall be erected without prior court approval.

By making the above restrictions, this Court does not imply that it will make "year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann, supra,* at 575.

The parties will draw and submit an order to the Court within fifteen (15) days. However, without said order this Memorandum Opinion is self-executing and must be implemented for the school year beginning on or about September 1, 1971. The Court will retain jurisdiction of this case. No stay will be granted by this Court. *Swann, supra,* at 570; *United States* v. *Board of Public Instruction,* 395 F.2d 66 (5th Cir. 1968); *Brewer* v. *School Board,* 397 F.2d 37 (4th Cir. 1968).

L. CLURE MORTON
United States District Judge

SUPPLEMENTAL APPENDIX H

Robert W. Kelley et al., Henry C. Maxwell, Jr., et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, et al.,
Defendants-Appellants-Cross-Appellees.
Nos. 71—1778, 71—1779.

United States Court of Appeals,
Sixth Circuit.
May 30, 1972.

On remand from the Court of Appeals, 436 F.2d 856, the United States District Court for the Middle District of Tennessee, Nashville Division, L. Clure Morton, J., adopted a school desegregation plan and appeal was taken. The Court of Appeals, Edwards, Circuit Judge, held that the district judge's choice of the Department of Health, Education and Welfare plan, which clearly appeared to be a plan for ending dual system in metropolitan school district based on race and substituting therefor a unitary one was within the court's judicial discretion; that where school system has been deliberately segregated the board must do more than establish rules which are fair on their face but serve to perpetuate effects of segregation; that record supported finding that racial discrimination in school district continued until close of record if not beyond; that population shifts did not eliminate duty of board to present plan for unitary system; and that it was appropriate to take notice of proportion of black and white students within area and to seek as practical plan for ending white and black schools and substituting schools representative of area in which students live.

Affirmed.

McCree, Circuit Judge, filed a concurring opinion.

1. Federal Civil Procedure (key) 161

Defendants in protracted school desegregation case waived issue of alleged failure to comply with class action rule because of changes in status of original party plaintiffs since commencement of the suits by failing to raise issue prior to trial and final adjudication of case. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

2. Schools and School Districts (key) 13

Class action to require school desegregation dealt with continuing constitutional violations and did not become moot because years of delay, much of it attributable to the defendants, resulted in the graduation of the named, original student plaintiffs from the school system before final decision.

3. Schools and School Districts (key) 13

Where school system has been deliberately constructed on a segregated basis by state action, a duty inheres in school board to do more than to establish rules which are fair on their face but which simply serve to perpetuate effects of such segregation.

4. Schools and School Districts (key) 71, 72, 141(1), 154

Record in desegregation case supported finding of district judge that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until close of record if not beyond, and that there was a background of racial discrimination by means of state law which motivated much of the school segregation.

5. Schools and School Districts (key) 13

Existence of population shifts in metropolitan district which helped to some degree to change racial composition of some schools during course of school desegregation case did not eliminate duty of school board to present plan for unitary school system and did not alter duty of district court, on default of school board to require production of a plan and order it into effect.

6. Schools and School Districts (key) 13

In devising plans to terminate residual effects of school segregation it is appropriate for the school system and district judge to take notice of proportion of black and white students within the area and to seek as practical a plan as may be for ending white schools and black schools and substituting therefore schools which are representative of the area in which the students live.

7. Schools and School Districts (key) 13

Earlier finding of good faith does nothinbg to excuse defaults and failures of school board to devise plan for school desegregation which is effective.

8. Appeal and Error (key) 170(1)

Where no motion was filed in school desegregation case for relief pertaining to claims of practical busing problems supposedly arising after desegregation order was filed in the district court, and in the Court of Appeals the statements of problems constituted allegations which were controverted by the plaintiffs, until the claims were presented in trial court with an opportunity for sworn testimony to be taken and facts decided by process of adversary hearing Court of Appeals had no jurisdiction over such issues.

9. Courts (key) 405(15)

While during pendency of appeal jurisdiction of case lies in the appellate court, if an unexpected problem arises concerning actual terms of order or judgment under appeal, district court may upon being apprised of problem and having determined its substantiality with or without a hearing certify to appellate court the desirability of remand for completion or augmentation of appellate record.

10. Courts (key) 259
Municipal Corporations (key) 57

Neither metropolitan city council nor the state legislature could forbid the implementation of court mandate based upon United States Constitution.

11. Injunction (key) 210

Injunctive decree in school segregation case is always subject to modification on basis of changed circumstances.

12. Schools and School Districts (key) 13

District judge's choice of Department of Health, Education and Welfare plan, which clearly appeared to be a plan for ending a dual school system in metropolitan school district based on race and substituting therefor a unitary one which included the transportation of black students of grades one to four to outlying schools and the cross transportation of whites of grades five and six was within judicial discretion.

APPENDIX B

13. Federal Civil Procedure (key) 181

Once class action in school desegregation case had been adjudicated and action of trial court had been reviewed by Court of Appeals it was neither necessary nor proper to continue to redetermine standing of plaintiffs to represent class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Avon N. Williams, Jr., Nashville, Tenn. (Jack Greenberg, James M. Nabrit, III, Norman J. Chachkin, Sylvia Drew, New York City, on the brief), for plaintiffs as appellees and cross-appellants.

Dick L. Lansden, Nashville, Tenn. (Harlan Dodson, Jr., Hamilton Gayden, Jr., Nashville, Tenn., on the brief), for defendants as appellants and cross-appellees.

K. William O'Connor, Civil Rights Div., Washington, D. C., for United States, amicus curiae.

Before EDWARDS, CELEBREZZE and McCREE, Circuit Judges.

EDWARDS, Circuit Judge.

In this case we do not write on a clean slate. What follows describes an incredibly lengthy record and settled law pertaining to segregated schools. We start with this latter, as recited in the United States Constitution and in three historic, unanimous decisions of the United States Supreme Court—the last dated 1971.

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.Const. Amed. XIV, § 1.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," Griffin v. County School Board, 377 U.S. 218, 234, 84 S.Ct. 1226, 12 L.Ed.2d 256; "the context in which we must interpret and apply this language (of *Brown II*] to plans for desegregation has been significantly altered." Goss v. Board of Education, 373 U.S. 683, 689, 83 S.Ct. 1405, 10 L. Ed.2d 632. See Calhoun v. Latimer, 377 U.S. 263, 84 S.Ct. 1235, 12 L.Ed. 2d 288. The burden on a school board today is to come forward with a plan that promises realistically to work *now*. Green v. County School Board of Kent County, 391 U.S. 430, 438-439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school

systems. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

After 17 years of continuous litigation the Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, appeals from a final order of the United States District Court for the Middle District of Tennessee requiring the School Board to take the necessary steps to end the racially separated school systems which it had previously been found to be operating. This order was a direct result of an order of this court approving the District Court's findings of violations of equal protection and vacating a stay of proceedings. In it we had noted:

> [T]he instant case is growing hoary with age. It is actually a consolidation of two cases. The first case, Kelley v. Board of Education of the City of Nashville, Civ.A. No. 2094, was filed in September of 1955; and the second case, Maxwell v. County Board of Education of Davidson County, Civ.A. No. 2956, was filed in September of 1960. A whole generation of school children has gone through the complete school system of Metropolitan Nashville in the intervening years under circumstances now determined to have been violative of their constitutional rights. A second generation of school children is now attending school under similar circumstances—and the remedy is not in sight. Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 436 F.2d 856, 858 (6th Cir. 1970).

The order of the District Judge is the first comprehensive and potentially effective desegregation order ever entered in this litigation. The District Judge tells us that now the remedy is at least in sight.

THE APPELLATE ISSUES

On appeal defendants contend 1) that the District Court had no jurisdiction to hear and determine this case because of failure to comply with Rule 23 of the Federal Rules of Civil Procedure and because of changes in the status of the original party plaintiffs since the commencement of these suits; 2) that the District Court's order is invalid because it requires integration of schools according to a fixed racial ratio, in violation of the rules set out in Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 402 U.S. at 23, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 and 3) that the plan ordered into effect should be reconsidered because of what the defendant School Board claims to be adverse effects on the health and safety of school children involved.

Plaintiffs as cross-appellants claim 1) that the District Court erred in adopting the Department of Health, Education and Welfare plan when the plan proposed by plaintiffs would have achieved a greater degree of integration; and 2) that the HEW plan should have been rejected because it places the burden of desegregation disproportionately upon Negro children.

HISTORY OF THE NASHVILLE—DAVIDSON COUNTY CASE

The history of school desegregation from Brown v. Board of Education, *supra,* to date can be traced in this case in the proceedings in the District Court, in this court, and in the United States Supreme Court: Kelley v. Board of Education of City of Nashville, 139 F.Supp. 578 (M.D.Tenn.1956) (Dissolution of three-judge court); Kelly v. Board of Education of City of Nashville, 159 F.Supp. 272 (M.D.Tenn.1958) (Disapproval of integratin plan and grant to Board of additional time to file a new plan); Kelley v. Board of Education of City of Nashville, 8 R.R.L.R. 651 (M.D.Tenn. 1958) (Approval of 12-year plan);

Kelley v. Board of Education of City of Nashville, 270 F.2d 209 (6th Cir. 1959) (Upholding District Court order); Kelley v. Board of Education of City of Nashville, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959) (Denial of certiorari); Maxwell v. County Board of Education of Davidson County, 203 F.Supp. 768 (M.D.Tenn.1960); Maxwell v. County Board of Education of Davidson County, 301 F.2d 828 (6th Cir. 1962), reversed in part and remanded sub nom. Goss v. Board of Education of Knoxville, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); Kelley v. Metropolitan County Board of Education of Nashville and Davidson County, 293 F.Supp. 485 (M.D.Tenn.1968) (Further proceedings in a consolidation of *Maxwell, supra,* and *Kelly, supra*); Kelley v. Metropolitan County Board of Education, 317 F.Supp. 980 (M.D.Tenn.1970); Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 436 F.2d 856 (6th Cir. 1970) (Memorandum opinion of the U. S. District Court (M.D.Tenn.) (filed June 28, 1971; Judgment (filed July 15, 1971)).

This case began in 1955 on the heels of the United States Supreme Court's decision in Brown v. Board of Education, *supra,* holding that "separate educational facilities are inherently unequal," *supra,* 347 U.S. at 495, 74 S.Ct. at 692. Plaintiffs, in a class action sought invalidation of the Tennessee school laws, T.C.A. §49-3701 et seq., which in specific terms required segregation of school pupils by race. (See Appendix A) In 1956 a three-judge federal court which had been convened to pass on the constitutionality of the state statute was dissolved when the defendant Board of Education conceded the unconstitutionality of the state statute by which it had previously been governed. Kelley v. Board of Education of City of Nashville, 139 F.Supp. 578 (M.D. Tenn.1956). The case was then remanded to the United States District Court for the Middle District of Tennessee. The District Judge determined that the case was an appropriate class action under Rule 23 of the Federal Rules of

Civil Procedure (Record, Min. Book 19 at 683). He ordered the defendant School Board to prepare and present a plan for desegregation of the Nashville schools.

Before judgment was entered, the State of Tennessee in January 1957 adopted a Parental Preference Law, T.C. A. § 49-3704, Pub.Acts 1957, cc. 9-13, 2 Race Rel.L.Rep. 215 (1957). (See Appendix A) This statute provided for separate white, black, and mixed schools, with attendance to be determined by parental preference. The District Court in September of 1957 held this statute to be unconstitutional on its face. 2 Race Rel.L.Rep. 970 (1957).

The defendant School Board thereupon (and nonetheless) presented a parental preference plan for white, black, and mixed schools substantially the same as that called for by the unconstitutional state law.

In February of 1958 the District Court held the School Board plan to be unconstitutional.

Later in the same year a grade-a-year desegregation plan was submitted by defendant School Board, approved by the District Court and the Court of Appeals, with certiorari denied by the United States Supreme Court.

In 1960 a suit was filed to desegregate the Davidson County schools. Maxwell v. County Board of Education of Davidson County, *supra*. It was brought on behalf of Negro children alleged to be denied their constitutional rights to equal education in the county school system. Again the suit was brought as a class action and recognized as such by the District Court under Rule 23 Fed.R.Civ.P. (Record, Min. Book 24 at 114.) The Davidson County School Board proposed a free transfer plan and it was approved by the District Court. On appeal Maxwell's free transfer plan was invalidated by the United States Supreme Court, *sub nom.*, Goss v. Board of Education of Knoxville, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963).

In 1963 the school systems of Nashville and Davidson County were then consolidated as part of a general consolidation of the City of Nashville and County of Davidson into one metropolitan government. Petitions for further relief, including an order to desegregate the Nashville-Davidson County schools and to enjoin further school construction pending such an order, were filed in the consolidated case, with additional plaintiffs intervening.

In 1968 the United States Supreme Court took further note of how the *Brown II* phrase "deliberate speed" was being employed to delay rather than to implement school desegregation.

For purposes of reemphasis, we again quote the unanimous opinion:

> [A] plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. "The time for mere 'deliberate speed' has run out," Griffin v. County School Board, 377 U.S. 218, 234 [84 S.Ct. 1226, 12 L.Ed.2d 256] "the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered." Goss v. Board of Education, 373 U.S. 683, 689 [83 S.Ct. 1405, 10 L.Ed.2d 632]. See Calhoun v. Latimer, 377 U.S. 263 [84 S.Ct. 1235, 12 L.Ed.2d 288]. *The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work* NOW. Green v. County School Board of Kent County, 391 U.S. 430, 438-439 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968). (Emphasis added.)

On the heels of these decisions plaintiffs sought relief consistent with them and lengthy hearings followed. In 1970 the District Judge entered findings of fact which were subsequently

reviewed and given effect by this court. Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, 436 F.2d 856 (1970). In its opinion this court said:

It would be well for those in authority in Nashville and Davidson County to read the able opinion [District Court opinion entered July 16, 1970] which we now revitalize by our present order. The emphasis in the quotation which follows is that of this court:

"[I]t is the Court's view that in the area of school zoning, school boards will fulfill their affirmative duty to establish a unitary school system only if attendance zone lines are drawn in such way as to maximize pupil integration. In drawing such lines, the defendant school board may properly consider in the total equation such factors as capacities and locations of schools, physical boundaries, transportation problems, and cost; however, none of these considerations can supersede the importance of the primary goal of maximizing integration.

"In looking to the facts of this case, the Court finds that many of the elementary and secondary school zone lines in the Nashville and Davidson County School System have not been drawn so as to minimize integration. *With the exception of zone lines drawn for new schools, the zone lines currently in existence were drawn prior to Brown* v. *Board of Education with the aim of maintaining segregation.* Though there has been some black population migration to formerly white areas, in large part *these zone lines continue to serve quite well the segregative purpose for which they were originally established.* The truth of this statement is made manifest when one examines the racial makeup of the pupil population in areas containing several contiguous attendance zones. In East Nashville, for example, there is a cluster of five elementary schools having contiguous attendance zones. Of these five schools, white pupils are in the great

majority in four schools, Baxter, Dalewood, Rosebank, and Bailey, while black students are in the majority in one of the schools, Inglewood. As a reference to the zone map will indicate, Inglewood is completely surrounded by the four predominantly white schools, and the Inglewood zone is drawn to enclose most of the black population living in the five school area. Defendants argue that they are applying the 'neighborhood' concept in the drawing of elementary school zone lines. *If such a concept is indeed being applied in this five school area, it appears to the Court that it is being applied solely to perpetuate segregation. Defendants contend that one of the prime advantages of 'neighborhood' schools is that they allow pupils to walk to and from school. If this is true, it is difficult to see why black pupils who live closer to Baxter or Bailey schools, for instance, are required to walk the greater distance to attend Inglewood school.*

"The same pattern is repeated in a seven school area in south and west Nashville. In this situation, the attendance zones for Ransom and Eakin schools are contiguous with the attendance zones for Ford, Greene, Head, Carter Lawrence, Murrel and Clemons schools. The former two schools are almost completely white, while the latter five schools are almost totally black.[7]

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[7] See Map No. 2 in Appendix and note the following figures* on the enrollment of these schools:

	W	B	%B
Ford Greene	0	887	100
Head	0	791	100
Carter Lawrence	0	516	100
Murrel	0	328	100
Clemons	51	519	90
Ransom	355	2	1
Eakin	487	5	1

*Based on plaintiff's exhibit No. 3.

Once again it appears that the zone lines as drawn insure that white neighborhoods will have white schools and black neighborhoods will have black schools. *As the above two illustrations make clear, by maintaining the old dual school zones, defendant has encouraged continued segregation rather than significant integration in the elementary schools.*

"Turning to junior high school zones, the Court finds much the same situation as in the elementary school. Though the 'neighborhood' concept is not applied in secondary school zoning, junior high school zones are drawn so that each school serves a particular residential area or 'service area' as it is sometimes referred to by defendant. These service areas cover a broader geographic area than a single neighborhood, for several elementary schools within their respective neighborhood zones feed graduating students into the junior high school within whose zone they lie. This process is generally described in terms of a 'feeder pattern.' Once again, a look at the existing zone lines convinces the Court that the junior high school attendance zones and the 'feeder patterns' which graduate elementary students into the junior high schools are structured so as to foster for the most part continued segregation or at best only token integration. *It is apparent that the zone lines as presently drawn are designed to provide racially identifiable 'black' schools for black residential areas and 'white' shcools for white residential areas.* For example, looking at a cluster of six contiguous junior high school zones, the Court finds that Bass, West End, and Moore Junior high schools are all predominantly white schools with their attendance zones being drawn so as to correspond significantly with white residential areas. On the other hand, Washington, Rose Park and Waverly-Bellmont are all racially identifiable as black schools and their attendance zones have been drawn in a manner effectively to prevent a

significant number of black pupils from attending school outside of the black residential area.[8]

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[8] *See* Map No. 3 in Appendix and note the following figures:*

	W	B	%B
Bass	777	12	2
West End	578	40	6
Moore	999	85	8
Washington	0	1,347	100
Rose Park	11	527	98
Waverly-Belmont	26	260	91

* Based on plaintiff's exhibit No. 3.

"Finally, looking to the high school zones, there is similar evidence of continued duality in the school system. For example, of five contiguous high school zones, three of the schools, Cohn, Hillsboro and Central, are racially identifiable as white schools. Their attendance zone lines form the boundary line between the predominantly white residential areas in south and west Nashville and the black residential areas to the north and east. These black areas are served by Cameron and Pearl high schools.[9]

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[9] *See* Map No. 4 in Appendix and note the following figures:

	W	B	%B
Cohn	960	45	4
Hillsboro	1,223	15	1
Central	899	202	18
Pearl	1	1,308	100
Cameron	0	1,212	100

"In connection with the segregative effect of present school zoning, it is interesting to note that while portable classrooms are in limited use in predominantly Negro schools, approximately 117 portables are in use in racially identifiable white

schools. These predominantly Negro schools, on the basis of their rated maximum capacities, have approximately 5,400 vacancies, yet the white schools, in zones tailored to white residential sections, are overcrowded. It would seem that rezoning could serve the dual purpose of alleviating this overcrowding and, at the same time, promoting the goal of integration.

"It is the Court's conclusion that defendant's current policy of attendance zoning does not facilitate rapid conversion from a dual to a unitary school system. As is evident from the foregoing discussion, the zone lines as they presently exist foster continued segregation in many instances.[10] *Corresponding as*

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[10] Of the 139 regular schools in the system in 1969—70, 88 had less than 10% black enrollment, 22 had 10% to 40% black enrolling (with the total enrollment of these latter 22 schools constituting only 16% of the entire metropolitan school enrollment), and finally 29 schools had more than 40% black enrollment. A clear racial pattern is present.

they do to racial residential patterns, it is difficult to envision any other result. Historic zones lines which purposely promote segregation must be altered. In making such alterations defendant board should take those steps 'which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.' Green v. County School Board of New Kent County, *supra* [391 U.S. 430] at 442, [88 S. Ct. 1689, 20 L.Ed.2d 716]."

Kelley v. Metropolitan County Board of Education of Nashville, Tennessee, *supra* at 859—861. (Footnotes in quotation.)"

We then remanded the case with instructions:

> We believe that "the danger of denying justice by delay" in this case is as clear as it was in Alexander, *supra;* Green v. County Board, *supra,* and Carter, *supra.*

> We now vacate the stay of August 25, 1970, with the intention of leaving in full effect and operation the judgment of the District Court of August 13, 1970. The present District Judge should proceed immediately to hold the necessary hearing upon objections to the Board of Education plan and thereafter to approve or modify same as the record which is developed appears to require, and thereupon enter an order of implementation. The time schedule for consideration and implementation of this order should, of course, meet the "maximum" standard set forth by the Supreme Court in the second *Carter* case (Carter v. West Feliciana Parish School Board, 396 U.S. 290, 293, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970)). The District Court may, of course, require reports (including a pupil locator map) and recommendations (including those of expert witnesses and the Department of Health, Education and Welfare) and consider them in its order of implementation. Id. at 862.

Acting within the terms of his sworn obligation a new District Judge proceeded to implement this court's instructions.

While he was thus engaged, the United States Supreme Court decided the third history making case pertaining to school segregation (Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)). The opinion for a unanimous Supreme Court was written by Chief Justice Burger. In recital of the facts and conclusions of law, it parallels and controls our decision of this case.

> We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. Brown v. Board of Education, 347 U.S. 483 [74 S.Ct. 686, 98 L.Ed. 873] (1954) (*Brown I*).

> This case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what Brown v. Board of Education was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Swann v. Charlotte-Mecklenburg Board of Education, *supra* at 5—6, 91 S.Ct. at 1271 (Footnote omitted.)

These words apply exactly to the fundamantal problems in the instant case also. The District Court order here under review is designed to "eliminate racially separate public schools established and maintained by state action." Tennessee is, as we have noted above, a state "having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." (See Appendix A) We here consider a District Court order designed to "implement dual systems and establish unitary systems at once."

> The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals. Swann v. Charlotte-Mecklenburg Board of Education, *supra* at 7, 91 S.Ct. at 1272.

This paragraph applies to the facts of the instant case without change of a single word.

Chief Justice Burger then turned to the question of appropriate remedial measure to eliminate state imposed segregation:

> The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measure of *Brown II.* that was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S., at 437—438 [88 S.Ct. 1689, 20 L.Ed.2d 716].
>
> If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> * * * * * *
>
> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and

> might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to profer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system. Swann v. Charlotte-Mecklenburg Board of Education, *supra* at 15—16, 91 S.Ct. at 1275.

The default of school authorities referred to by Chief Justice Burger is equally illustrated by the history of our present case.

With this history and these principles before us, a tabular comparison of the fact situations and District Court plans presented in the *Swann* and *Kelley* case is appropriate:

	Swann v. Bd. Ed.	Kelley v. Bd. Ed.
Date of original complaints	1965	1955
No. of schools (before plan)	107 (1968—69)	139 (1970—71)
No. of schools (after plan)	107	133 (1971—72)
Total enrollment	84,000 (approx.)	94,170 (1970—71)
Per cent white students	71%	75% (75.12%)
Per cent black students	29%	25% (24.63%)
Walking distance (after plan)	1½ miles	1½ miles
No. students bused prior to plan	23,600	33,485
No. white students bused prior to plan	Exact figures not available, but it is clear that a large majority of students bused were white	30,000
No. black students bused prior to plan		3,500 (approx.)
Extent of segregation to plan	In 1969 ⅔ of the black students were then attending schools that were either totally or 99% black.	In 1969 81% of all white students were attending schools that were over 90% white, while 62% of all black students were attending schools that were over 90% black.

	Swann v. Bd. Ed.	Kelley v. Bd. Ed.
Net increase in No. of students bused as a result of court adopted plan	13,300	15,000 (approx.)
No. of additional buses required	138 54-passenger buses	82 84-passenger buses
No. of buses obtained to carry out plan	Court opinions do not contain this information.	None
Ratio of white to dent population employed by court approved plan as guide	71%—29%	75%—25%
Per cent of schools desegregated by plan within guide related ratios	100% of elementary* schools would have black student population of 9%—38%.	77% of elementary schools would have a black student population of 16%—41%; 22 outlying schools would have a black student population of 0% — 22%
One race schools remaining under plan due to travel distance	Apparently none	5

*Junior and Senior High Schools desegregation under the *Swann* plan was likewise considerably closer to ideal unitary school standards than the plan approved by the District Court in this case.

These figures show that during the three-year period nearly two-thirds of the black students in the Nashville system went to racially identifiable schools, and more than four-fifths of the white students attended racially identifiable schools.

Busing did not come to Nashville by federal court decree. This record demonstrates that Nashville and Davidson County have long used extensive bus transportation as a normal part of their school systems. Busing was, however, employed wholly disproportionately for the transportation of its white students as compared to its black students (30,000 white to 3,500 black). in this regard the District Judge's opinion noted:

> Since the defendants have consistently transported large numbers of students to promote segregation, some adjustment must be made to reverse this unconstitutional practice.

The District Court clearly found that defendants had defaulted in relation to their duty to dismantle their segregated school system prior to 1970. The District Court also found that although defendants had repeatedly been asked and ordered to produce an adequate plan, they had failed to do so. It noted that the School Board accepted as a policy statement "an ideal student racial ratio of an integrated school as one which is 15% to 35% black." Yet its analysis of the plan actually submitted by the School Board showed it to be utterly inadequate.

> The Board of Education submitted a plan for pupil integration in August, 1970. Included in this plan was a policy statement that the school board "accepts as an ideal student racial ratio of an integrated school as one which is 15% to 35% black."
>
> The August, 1970 plan made 49 minor geographic zone changes, and provided for the transportation of an additional 1162 pupils. The result of the plan was to leave the

The general principles of *Swann* were, of course, enunciated by the Supreme Court for guidance of District Courts and Courts of Appeals in *all* school segregation cases. In view of the close factual resemblances between this case and *Swann*, these principles, however, apply here a fortiori.

THE REMEDIAL ORDER OF THE DISTRICT COURT

The nature of the problem facing the District Court many years after Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), is vividly portrayed in the statistics and the table set forth below.[1]

Racial Composition for the Three Years Preceding Hearings on Motion for Further Relief

1967-68—85% of the white students attended schools that were over 90% white.

63% of the black students attended schools that were over 90% black.

1968-69—80% of the white students attended schools that were over 90% white.

61% of the black students attended schools that were over 90% black.

1969-70—81% of the white students attended schools that were over 90% white.

62% of the black students attended schools that were over 90% black.

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[1] These statistics are based largely upon plaintiffs' exhibits in the court below, but we can find no contrary evidence offered by defendants.

elementary schools significantly unchanged. Six of the 38 high schools and junior high schools would remain at least 50 per cent black. Fifty-seven per cent of the black high school and junior high school students would attend these six schools. The racial composition of two schools would be at least 95 per cent black and four other schools would be at least 90 per cent black. This would result in 47 per cent of the black students attending schools where the composition would be above 90 per cent black. Eight schools, acommodating 20 per cent of the black students, would operate with 15-35 per cent black students. Fifteen schools would operate with 95 per cent or above white students. (Footnotes omitted.)

Concerning the School Board plan, the District Court concluded:

The pupil integration plan submitted by the school board, viewed in the most favorable light, constitutes mere tinkering with attendance zones, and represents only a token effort. It clearly falls short of meeting the objectives and tests set out in the decisions of the United States Supreme Court. Swann v. Charlotte-Mecklenburg Board of Education, *supra;* Davis v. Board of School Commissioners, *supra;* Green v. County School Board, 391 U.S. 430 [88 S.Ct. 1689, 20 L.Ed.2d 716] (1968). In effect, the defendant has made no effort to meet its affirmative duty to establish a unitary school system "in which racial discrimination would be eliminated root and branch." Green v. County School Board, *supra,* at 437-438 [88 S.Ct. 1689, 20 L.Ed.2d 716]; quoted in McDaniel v. Barresi, [402] U.S. [39], [91 S.Ct. 1287] 28 L.Ed.2d 582, 585 (April 20, 1971).

Since the defendants have, in effect, failed to submit a constitutionally sufficient plan, the Court must examine the other plans. (Footnote omitted.)

The plan adopted by the District Judge was one proposed by the United States Department of Health, Education and Welfare. It is described in detail in his Memorandum Opinion, dated June 28, 1971, and in his Judgment, dated July 15, 1971, both of which are by reference hereby incorporated as a part of this opinion. For our present purpose it suffices for us to note that in all respects which have come to our attention, the HEW plan approved by the District Judge represents a somewhat less stringent approach to desegregation than the plan approved by the United States Supreme Court in *Swann, supra.*

Major portions of the Court's comprehensive Opinion and Judgment, such as those dealing with faculty desegregation, school construction and maintenance, and transfer policy, etc., are not discussed herein because no appellate issues have been presented as to those features.

I The Rule 23 Issue

As to the Rule 23 issue, earnestly if belatedly sought to be raised by appellants, we affirm the Memorandum Order of the District Judge, dated July 21, 1971, for the reasons set forth therein, and print same for ready reference as Appendix B.

[1] Further, we note that this issue was clearly waived by failure of appellants to raise it prior to trial and final adjudication of this case.

[2] We also note that such a class action as this dealing with continuing constitutional violations does not become moot because of years of delay (much of it attributable to appellants) which occasioned the graduation of the named, original student plaintiffs from the school system before final decision.

[6] Perhaps the primary thing that the *Swann* case decided was that in devising plans to terminate such residual effects, it is appropriate for the school system and the District Judge to take note of the proportion of white and black students within the area[2] and to seek as practical a plan as may be for ending white schools and black schools and substituting therefor schools which are representative of the area in which the students live.

We have noted that the District Judge in *Swann* employed a flexible 71% white to 29% black population ratio as a guide in seeking a practical plan. The Supreme Court specifically approved his doing so. *See* Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 402 U.S. at 16, 23-24, 91 S.Ct. at 1267, 28 L.Ed.2d 554. The District Judge, in this case clearly read and followed the *Swann* guideline. As to this issue, we find no error.

[7] An earlier finding of "good faith" does nothing to excuse the defaults and failures shown by this record. "The measure of any desegregation plan is its effectiveness." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971). *See also* Green v. County School board, 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

III Practical Problems

[8] If there is an appellate issue of substance in this appeal, it is to be found in the practical problems which appellants claim have developed since the entry of the District Judge's order. Appellant summarizes these issues thus:

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[2] The area referred to in this case is all of Davidson County, including the City of Nashville, which is included in the jurisdiction of defendant Metropolitan Board of Education.

II The Ratio and Residual Effect Issues

(Plaintiffs' stated Issues 2, 3 & 4)

[3] Where a school system has been deliberately constructed on a segregated basis by state action, a duty inheres in the School Board to do more than to establish rules fair on their face which simply serve to perpetuate the effects of such segregation. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26, 28, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

[4] The record in this case supports the District Judge's findings that racial discrimination in school construction, assignment of temporary buildings, assignment of teachers, and assignment of students continued until the close of the record—if not beyond. The record also discloses a background of racial discrimination by means of state law which motivated much of the school segregation. (See Appendix A)

[5] The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system.

Nor, of course, does it alter the duty of the District Court on default of the school board to require production of such a plan and order it into effect. Chief Justice Burger put the matter thus in the *Davis* case:

> Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. Davis v. School Commissioners of Mobile County, *supra,* 402 U.S. at 37, 91 S.Ct. at 1292.

> A plan which exposes the children in the school system to undue danger to health and accident, interferes with their education by requiring excessive periods of time on buses, causes them to leave home before daylight or to return home after dark, exposes them to the dangers of travel in old and inadequately maintained equipment and causes elementary school children, both black and white, to suffer hardships to which young children should not be exposed can hardly be termed feasible, workable, effective and realistic.

[9] Substantial as these problems appear to be on the surface, there are two reasons why no relief can be granted in this forum. The first is that no motion for relief pertaining to these facts has ever been filed by appellant in the District Court. These statements at this point are allegations and they are controverted by the appellee. This, of course, is an appellate court—not a trial court. As appellants well know, the arena for fact-finding in the federal courts is the United States District Court. Until these claims have been presented in a trial court, with an opportunity for sworn testimony to be taken and controverted issues and facts decided by the process of adversary hearing, this court has no jurisdiction.[3]

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[3] During the pendency of an appeal, jurisdiction of the case lies, of course, in the appellate court. There is, however, familiar law to deal with an unexpected problem which arises in this period concerning the actual terms of the order of judgment under appeal. The District Court may on being apprised of the problem and having determined its substantiality (with or without hearing) certify to the appellate court the desirability of a remand for completion or argumentation of the appellate record. No memory in this court encompasses a refusal of such a request.

The record is clear that no request for remand was made by the District Court, obviously, at least in part, because appellants made no motion for relief before the District Court.

The second reason as to why appellants are entitled to no relief on this issue probably serves to explain the first. The entire "record" upon which appellant bases his plea for relief as to practical problems is a "Report to the Court" of Dr. Brooks, Director of Schools of the Metropolitan County Board of Education. This report is dated October 18, 1971, just over a month after the opening of school. While we are advised that it was sent to the District Judge, as we have noted, no motion of any kind seeking any District Court action was ever filed concerning it. Even more important, the statement on its face suggests that local authorities in Nashville and Davidson County have not made good faith efforts to comply with the order of the District Judge.

Dr. Brooks' affidavit does present this exculpatory explanation which serves to point in the direction of other authorities as those responsible for the inconveniences and hazards of which Dr. Brooks' statement speaks. The statement says:

> The School Board is fiscally dependent in that its budgets must be approved by the Metropolitan City Council. In approving the budget of the School Board on June 30, 1971, Council members demanded assurance that no funds included in the budget would be used to purchase buses for the purpose of transporting students to establish a racial balance. The 1971-72 budget did provide for the purchase of 18 large buses to replace obsolete equipment to provide transportation for students to the new comprehensive McGavock High School.

[10] It is clear, however, that neither the Metropolitan City Council or, for that matter, the Legislature of Tennessee can forbid the implementation of a court mandate based upon the United States Constitution. In a companion case to *Swann, supra,* Chief Justice Burger, writing again for a unanimous court held that an anti-busing law which flatly forbids assign-

ment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibits busing for such purposes was invalid as preventing implementation of desegregation plans required by the Fourteenth Amendment. North Carolina State Board of Education v. Swann, 402 U.S. 43, 45-46, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971). *See also* Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958).

Dr. Brooks' statement also furnishes the bus schedule of the Metropolitan County Board of Education by yearly models. It shows that the Board has an average of 18.9 buses for each of the last 10 model years. The 18 buses purchased in 1971 were described by Dr. Brooks as "to replace obsolete equipment." It appears from the Metropolitan Board's own statements that the Board and the local authorities in Nashville did not purchase one piece of transportation equipment for the purpose of converting the Metropolitan County Board of Education school system from a dual school system segregated by race into a unitary one, as called for by the District Judge's order.

[11] At court hearing we had been puzzled as to why counsel for the Board had failed to go back to the District Court to report on the grievous circumstances which he so strongly alleged before us. Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances. Sloan v. Tenth School District of Wilson County, 433 F.2d 587, 589-590 (6th Cir. 1970). Further acquaintance with the record, which, of course, the District Judge would have known in detail, leaves us in no further quandry as to the reasons for counsel's reluctance.

IV Plaintiffs-Appellants' Plan

[12] Our review of this record convinces us that the District Judge's choice of the HEW plan as opposed to plaintiffs' plan was well within his judicial discretion. It may not be ideal, but

to us it seems clearly to be a plan for ending a dual school system based on race and substituting therefor a unitary one. It promises to work and to work *now*. Green v. County School Board of Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

V. Plaintiffs-Cross-Appellants' Discrimination Claim

Plaintiffs-Cross-appellants claim that the grade school plan discriminates against Negro students in the lowest elementary grades.

The feature complained of in this issue is the transportation of black students in grades 1-4 to outlying schools, paralleled by the cross-transportation of white students in grades 5-6. In this regard the HEW plan appears to follow the pattern of the school plan approved in *Swann*. Swann v. Board of Education, *supra,* 402 U.S. at 10, 91 S.Ct. 1267, 28 L.Ed.2d 554. The Supreme Court made no reference to this feature, and neither in *Swann* nor in this case does the record seem to provide adequate rationale for it. We do not believe, however, that we can appropriately hold that the District Judge abused his discretion in approving the HEW plan which (like the plan in *Swann*) incorporated this feature.

It may be that this is a temporary expedient or it may be that there are practical reasons to justify it for longer duration. In any event, any adverse effects of this aspect of the plan can, of course, likewise be brought to the District Judge's attention when the case is back before him.

The Intervention

Twenty-four hours before oral arguments in this appeal, the United States Department of Justice filed a motion to intervene as amicus curiae. In spite of the extraordinary delay in filing the

motion, we granted leave to intervene and invited the representative of the Justice Department who appeared to address the court.

On reading the motion, hearing oral argument, and questioning counsel, we determined that the representative of the Justice Department had not had the opportunity to read the District Court record in this case and was not aware in advance of hearing that the claimed practical problems had never been presented to or adjudicated by the District Judge.

One America

This nation has been told by a Presidential Commission that our country is rapidly becoming divided into two societies—one black and one white. Report of National Advisory Commission on Civil Disorders 1 (3/1/68).

The Constitution of the United States was written for one nation, "indivisible." As it speaks to men's consciences, the Constitution argues against division and apartheid.

In the public domain, however, the Constitution commands. Here the constitutional command is One America.

The Constitution and the Supreme Court opinions quoted above do not command the use of busing any more than they command the use of books, desks, paper, pens, buildings, lights, heat, and other tools, equipment and supplies needed in modern life and in modern education. What the Constitution and the Supreme Court say about the principal issue of this case is that no one may forbid a school board (or a federal court) from employing any of the tools of modern life in carrying out a constitutional mandate. Davis v. Board of School Commissioners of Mobile County, 402 U.S. 33, 37-38, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971).

The District Court order in this case specifically retained jurisdiction. Thus, upon our affirmance, the door of the District Court is clearly open (as it has been!) to the parties to present any unanticipated problems (not resulting from failure to comply with its order) which may have arisen or may arise in the future.

We now affirm the findings of fact, conclusions of law, and judgments of the District Court.

The District Judge's order noted that no stay would issue and we likewise note that any stay of this order must be sought from the United States Supreme Court.

APPENDIX

CHAPTER 37

SEGREGATION OF RACES

SECTION.

49-3701-49-3704.	[Unconstitutional.]
49-3701-49-3703.	[Unconstitutional.]

Compiler's Note. Under the decision of Roy v. Brittain (1956), 201 Tenn. 140, 297 S.W.2d 72, the status providing for the compulsory separation of races in the field of public education are no longer in effect, and therefore these sections have been omitted. They read:

49-3701. Interracial schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. [Acts 1901, ch. 7, § 1; Shan., § 6888a37; Code 1932, § 11395.]

49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement. [Acts 1901, ch. 7, § 2; Shan., § 6888a38; Code § 11396.]

49-3703. Penalty for violations.—Any persons violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months. [Acts 1901, ch. 7, § 3; Shan., § 6888a39; mod. Code 1932, § 11397.]

49-3704. [Unconstitutional.]

Compiler's Note. This section was held unconstitutional in Kelley v. Board of Education (1959), 6 Cir. 270 F.2d 209 and is, therefore, omitted. It read:

49-3704. Separate schools authorized.—Boards of education of counties, cities and special school districts in this state are authorized to provide separate schools for white and negro children whose parents, legal custodians or guardians voluntarily elect that such children attend school with members of their own race. [Acts 1957, ch. 11, § 1.]

CHAPTER 22—TRANSPORTATION OF SCHOOL CHILDREN

SECTION.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.

49-2210. Color and markings of buses.

49-2213. Speed limit.

49-2201. Power of boards to provide transportation—Use to achieve racial balance prohibited.—Boards of education many provide school transportation facilities for children who live over one and one-half (1½) miles by the nearest accessible route from the school to which they are assigned by the board of education and in which they are enrolled; provided, however, that the boards of education may, in their discretion, provide school transportation facilities for children who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled, but the county shall not be entitled to receive state transportation funds for any student, other than physically handicapped children, who live less than one and one-half (1½) miles by the nearest accessible route from the school in which they are enrolled; provided, that nothing in this chapter shall be construed to prevent a board of education from transporting physically handicapped children, regardless of the distance they live from school, under rules and regulations adopted by the state board of education; and provided further, that said boards shall have power to purchase school transportation equipment, employ school transportation personnel, and contract for transportation services with persons owning equipment, and pay for same out of funds duly authorized in the budget approved by the quarterly county court; provided further, that said boards in employing school transportation personnel and in contracting for transportation services with persons owning equipment are hereby authorized

to enter into contracts for such services for periods of time as long as, but not exceeding, four (4) years from the date of making such contracts, it being the purpose of this section to permit a reasonable degree of employment security for such school transportation personnel.

Provided, however, no board of education shall use or authorize the use of any school transportation facilities for the purpose of achieving a racial balance or racial imbalance in any school by requiring the transportation of any student or pupil from one school to another or from one school district established for his neighborhood to another. [Acts 1947, ch. 92, § 1; 1949, ch. 233, § 1; C.Supp.1950, § 2495.1 (Williams § 2495.2); Acts 1957, ch. 10, § 1; 1957, ch. 400, § 1; 1970 (Adj. S.), ch. 491, § 1.]

Amendment. The 1970 amendment added the last paragraph to this section.

Effective Date. Acts 1970 (Adj. S.), ch. 491, § 2. February 27, 1970.

[Note that a statute similar to the proviso in the last paragraph of the statute above was held unconstitutional by the United States Supreme Court. North Carolina State Board of Education v. Swann, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971).]

APPENDIX B

MEMORANDUM AND ORDER
(Filed July 21, 1971)

The defendant Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, filed two motions, to-wit, a motion to set aside the judgment entered in this cause

on July 16, 1970, and a motion to set aside the memorandum opinion filed June 28, 1971, which motions are grounded on the failure of the Court to comply with Rule 23 of the Federal Rules of Civil Procedure.

Apparently these motions were filed without counsel for the defendant having made even a casual perusal of the record in the consolidated cases.

The history of the consolidated cases reveals:

The first cause of Robert W. kelley, et al. v. Board of Education of the City of Nashville, Davidson County, Tennessee, et al., Civil No. 2094, was filed on September 23, 1955. This case will be hereinafter referred to as the "first case."

The case of Henry C. Maxwell, Jr., et al. v. County Board of Education of Davidson County, Tennessee, et al., Civil No. 2956, was filed on September 19, 1960. This case will be hereinafter referred to as the "second case."

These cases were consolidated by consent order filed September 10, 1963.

Rule 23 of the Federal Rules of Civil Procedure as to class action was amended, effective July 1, 1966. Prior to the amendment, class actions were referred to as "spurious" or "true" class actions. Prior to the amendment, the requirements for the maintenance and determination of the existence of a proper class action were less stringent than those requirements as set forth in Rule 23, as amended. Prior to its amendment, Rule 23 did not require detailed findings and determinations by the Court as set forth in subsection (c) of the Rule, as amended.

First Case

By Memorandum filed on January 21, 1957, the Honorable William E. Miller determined "that the rights of the plaintiffs

and others similarly situated to attend the public schools of the City of Nashville without discrimination on account of race are recognized and declared, . . ." Record, Min. Book 19, at 679.

By findings of fact and conclusions of law filed on February 20, 1957, the Honorable William E. Miller adjudicated that Case No. 2094 was "properly brought as a class action under Rule 23(a) of the Federal Rules of Civil Procedure. Title 28 U.S.C." Record, Min. Book 19 at 783.

On August 15, 1958, the case was appealed to the Sixth Circuit Court of Appeals. On July 20, 1959, the Court of Appeals affirmed the judgment of the District Court, thereby affirming the determination of the Honorable William E. Miller that this was a proper class action.

On September 10, 1963, a consent order was entered in Case No. 2094, the first case, and Case No. 2956, the second case, in which the parties agreed and stipulated that the functions and powers of the defendants Board of Education of the City of Nashville and County Board of Education of Davidson County were vested in the Metropolitan School System, and the "Transitional Board of Education for the Metropolitan Government of Nashville and Davidson County" was substituted as defendant. All orders, judgments, and other proceedings in the first case and the second case were made effective as to the substituted defendant. There was an express provision that all orders, judgments and proceedings entered previously would remain in full force and effect, and that none of the rights of the parties would be affected or prejudiced.

By order of December 3, 1964, the Metropolitan County Board of Education and its board members were made parties defendant in lieu of the Transitional Board. Again, there was a provision that all orders, judgments and proceedings in both cases would reamin in full force and effect and that none of the rights of any parties would be affected or prejudiced.

By order entered on October 7, 1968, certain additional parties, including infants and their parents, were added as intervening plaintiffs to have full standing as plaintiffs.

The two cases were again appealed to the Sixth Circuit Court of Appeals. The opinion of the Court of Appeals was filed in this Court on February 8, 1971.

Second Case

On November 23, 1960, the Honorable William E. Miller adjudicated that "this is a class action brought not only by the plaintiffs for their own benefit but also on behalf of all other persons similarly situated." Record, Min. Book 24, at 114.

This case was appealed to the Court of Appeals for the Sixth Circuit on February 20, 1961.

The orders in the consolidated cases of September 10, 1963, December 3, 1964, and October 7, 1968, noted above also apply to this case.

As appears above, the Honorable William E. Miller carefully adhered to Rule 23 as it existed at the time of the filing of these two cases. The Court of Appeals did not question his determination, but affirmed the actions which he took in the matter. In addition, in the latest mandate to the District Court received from the Court of Appeals in February, 1971, this Court was instructed to implement the July 16, 1970 opinion of the Honorable William E. Miller.

[13] This Court does not feel once a class action has been adjudicated and the action of the trial court has been reviewed by the Court of Appeals, that it is necessary or proper to continue to redetermine the standing of the plaintiffs to represent a class. The United States Supreme Court in its order implementing the amendment to Rule 23 states:

> ". . . the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions then pending except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice in which event the former procedure applies."*

See also Escott v. Barchris Construction Corp., 283 F.Supp. 643 (S.D.N.Y.1968); Polakoff v. Delaware Steeplechase and Race Assn., 264 F.Supp. 915 (Del.1966).

This clearly indicates an intent that there should not be a continuous readjudication of this question in cases where there has been a lengthy history of litigation, both in the district and the appellate courts. Frankly, this Court feels that it is not feasible or practical to have continuous adjudication of such items.

In view of the above, the Court is not required to determine (1) whether this question should have been raised prior to the adjudication of the cause, and (2) what, if any, effect the alleged failure to comply with Rule 23 would have on the right of the individual plaintiff children who reside throughout Davidson County, Tennessee, to assert their constitutional privilege to attend an integrated school in a unitary school system.

The motions are hereby denied.

L. CLURE MORTON
United States District Judge

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* Paragraph 2, Order of the Supreme Court of the United States, February 28, 1966, reporting amendments to the Federal Rules of Civil Procedure for the United States District Courts to the United States Senate and House of Representatives. This is reported in 15 L.Ed.2d lxxv.

McCREE, Circuit Judge (concurring).

I agree with the majority opinion on the issues it discusses. Nevertheless, I wish to add a few observations concerning our reasons for rejecting plaintiffs' cross-appeal and affirming for the present, the District Court's selection of the HEW plan.

The District Court, in deciding to reject plaintiffs' plan, recognized that under Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); Davis v. School Commissioners of Mobile County, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971); and Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), its duty was to select the plan that appeared to be the most effective in eradicating the effects of past segregation, unless it would be impractical to adopt such a plan. The court found that plaintiffs' plan was "impractical and not feasible" because of the costs and transportation problems that would result from the inclusion of certain outcounty schools in the plan. The court also relied upon the fact that plaintiffs' plan left to the school board the specifics of pupil assignment, grade organization, school structuring, and school district zoning.

My colleagues and I agree that there is no need at this juncture to hold that the District Court abused its discretion in thus preferring the HEW plan over that of plaintiffs. The HEW plan promises to accomplish a significant degree of integration, and it is a plan that promises realistically to work and to work *now*. Green v. County School Board of New Kent County, *supra,* 391 U.S. at 439, 88 S.Ct. 1689, 20 L.Ed.2d 716. Although plaintiffs' plan might have more effectively desegregated the district's schools, its inclusion of outlying schools and its lack of specificity rendered it, in the court's opinion, impractical and unfeasible. Since the District Court has retained jurisdiction in order to supervise the implementation and effectiveness of the HEW

plan, plaintiffs have the option of revising their plan to eliminate the defects noted by the court and requesting the court to make specific changes in the plan to promote, in a practical way, more effective integration. If the court should then find that plaintiffs' plan is "feasible and pedagogically sound," Robinson v. Shelby County Board of Education, 442 F.2d 255, 258 (6th Cir.), on remand 330 F.Supp. 837 (W.D.Tenn.1971), appeal pending, No. 71-1966 (6th Cir.), it would be required to adopt that plan. See Harrington v. Colquitt County Board of Education, 460 F.2d 193 (5th Cir. 1972); Monroe v. Board of Commissioners of City of Jackson, Tennesse, 453 F.2d 259, 262 (6th Cir. 1972), cert. filed, 406 U.S. 945, 92 S.Ct. 2045, 32 L.Ed.2d 333 (1972) (No. 71-1249); Robinson v. Shelby County Board of Education, *supra;* Davis v. School District of City of Pontiac, Inc., 443 F.2d 573, 576-577 (6th Cir.), cert. denied, 404 U.S. 913, 92 S.Ct. 233, 30 L.Ed.2d 186 (1971). In the special circumstances of this case, therefore, there is no need to remand and thereby possibly jeopardize implementation of the first desegregation plan ordered into effect in this school district that promises, after 17 years of litigation, realistically to work now.

With respect to plaintiffs' contention that the District Court abused its discretion in adopting a plan that places the greater burden of desegregation on black children and their parents, I observe initially that, although the plan approved by the Supreme Court in *Swann* appears to have contained a provision that in some respects resembles one of the features of the HEW plan attacked by plaintiffs herein—the pairing and clustering feature that requires all children in grades one through four to attend suburban schools while all children in grades five and six attend the inner-city schools—*Swann* cannot be read as uncritically approving any plan employing a similar technique if it has an unreasonably disparate racial impact. The issue apparently was not raised in the Supreme Court and the Court did not discuss it. Moreover, the District Court in *Swann,* in ap-

proving the adoption of this feature of the school board's plan, did so "only (1) with great reluctance, (2) as a one-year, temporary arrangement, and (3) with the distinct reservation that 'one-way bussing' plans for the years after 1969-70 will not be acceptable." Swann v. Charlotte-Mecklenburg Board of Education, 306 F.Supp. 1291, 1298 (W.D.N.C.1969). And, following the Supreme Court's decision in *Swann,* the District Court rejected a revised plan proposed by the school board because, among other reasons, the plan continued to place a disproportionate burden on black children and their parents without showing any educational justification therefor. Swann v. Charlotte-Mecklenburg Board of Education, 328 F.Supp. 1346, 1352-1353 (W.D.N.C.1971).

Since I agree, however, that remand is not required at this time, and since I wish to make it clear what the majority opinion is *not* holding with respect to this issue, I add the following comments.

Without a compelling justification, adoption of a plan that places a greater burden of accomplishing integration on black students and their parents is impermissible, whether this be phrased in terms of an equal protection violation because the plan was the school board's product, *see, e. g.,* Lee v. Macon County Board of Education, 448 F.2d 746, 753-754 (5th Cir. 1971); Carr v. Montgomery County Board of Education, 429 F.2d 382, 385 (5th Cir. 1970); Brice v. Landis, 314 F.Supp. 974, 978-979 (N.D.Cal.1969), or in terms of an abuse of the court's discretion in fashioning an equitable remedy to rectify the effects of past injustice. Although adoption of such a plan might be justified on the basis of the nature of facilities involved, or on practical, administrative considerations, or on the need to adopt a temporary expedient to assure at least immediate substantial progress toward the creation of a unitary school system (*see* Swann v. Charlotte-Mecklenburg Board of Education, *supra,* 306 F.Supp. at 1298), we cannot determine the

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reason for the District Court's decision because the court did not discuss this issue in its memorandum opinion. Ordinarily, in such a case, we would remand for findings and conclusions by the District Court. *See* Gordon v. Jefferson Davis Parish School Board, 446 F.2d 266 (5th Cir. 1971) (per curiam).

However, the same considerations that argue against remand on the issue of the court's adoption of a less effective plan are persuasive here as well. The integration plan adopted by the court has been in operation during the 1971-72 school year, and the court has retained jurisdiction of this case to oversee and, if necessary, to modify the plan's implementation. The defendant school board has indicated in this court that it intends to seek modification on the basis of asserted practical problems that have become apparent since the plan was put into effect. Plaintiffs have indicated dissatisfaction with the adoption of a plan less effective than that proposed by them, and we have indicated that they may seek further relief in the District Court. In these circumstances, I agree that we should not now disturb the District Court's approval of the HEW plan and possibly encourage the kind of delay and inaction that has caused this case to pend for 17 years. Plaintiffs may seek modification of the court's order on the ground that the plan places a disproportionate burden on black children and their parents, and this issue can be litigated and determined before the beginning of the 1972-73 school year. In this way, the disproportionate burden asserted by plaintiffs will exist at most for only a short period of time and will amount to no more than a transitory phase (assuming the absence of sufficient justification for maintaining it permanently) in the over-all creation of a unitary school system.

It is to be emphasized, nevertheless, that our refusal to take affirmative action on this issue at this time results only from the peculiar timing, posture, and history of this case. Our opinion

should not be construed in any way as a qualification of the principle that a district court has an obligation to endeavor to distribute the burden of integration equitably on all races and that any deviation from this norm, without a compelling justification, is impermissible.

Finally, I observe that the majority opinion does not discuss plaintiffs-appellees' contention that they should be awarded double costs and attorneys' fees because the school board's appeal is frivolous within the meaning of Fed.R.App.P. 38. Since the class action issue obviously has no merit, and since the only issue raised by the Board that might have merit has never been presented to the District Court, I would award the requested double costs and attorneys' fees. *See* Coppedge v. Franklin County Board of Education, 404 F.2d 1177, 1179-1180 (4th Cir. 1968); cf. Monroe v. Board of Commissioners of City of Jackson, Tennessee, *supra,* 453 F.2d at 262-263. The long history of this litigation would, in my opinion, make such an award particularly appropriate. *Cf.* Clark v. Board of Education of Little Rock School District, 449 F.2d 493, 499 (8th Cir. 1971), cert. denied, 405 U.S. 936, 92 S.Ct. 954, 30 L.Ed.2d 812.

No. 72-294. L. Goldstein's Sons, Inc., petitioner, v Trio Process Corporation

409 US 997, 34 L Ed 2d 262, 93 S Ct 319.

November 6, 1972. Motion of the Ford Motor Company for leave to file a brief, as amicus curiae, granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

Same case below, 461 F2d 66.

No. 72-313. Metropolitan County Board of Education of Nashville and Davidson County, Tennessee, C. R. Dorrier, Chairman, et al., petitioners, v Robert W. Kelley et al.

409 US 1001, 34 L Ed 2d 262, 93 S Ct 322.

November 6, 1972. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

Same case below, 463 F2d 732.

No. 85-870 (3)

Supreme Court, U.S.
FILED
DEC 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,

Petitioners,

v.

ROBERT W. KELLEY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the court of appeals correctly decided that, in conformity with the practice of this Court and virtually every other circuit, the determination of entitlement to attorneys' fees for a successful appeal in a civil rights case should be made in the first instance by the district court?

2. Whether the court of appeals, based on the facts of this case and its determination of the meaning of its own prior orders, correctly held that prevailing plaintiffs in this school desegregation suit were entitled to fees for work done prior to 1972, in conformity with

Bradley v. City of Richmond, 416 U.S. 696 (1974) and Hutto v. Finney, 437 U.S. 678 (1978)?

3. Whether the court of appeals correctly remanded this case to the district court for reconsideration of the amount of the fee award under proper legal standards?

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NO. 85-870

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION
OF NASHVILLE AND DAVIDSON COUNTY
TENNESSEE, et al.,

Petitioners,

v.

ROBERT W. KELLEY, et al.,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully urge that this case presents no issues that warrant review by this Court. Rather, it

involves: (1) an internal operating procedure of the Sixth Circuit; (2) a nonrecurring issue relating to the retroactive application of the attorney fee statutes; and (3) the specific facts relating to an appropriate fee award in this case.

STATEMENT OF THE CASE

This school desegregation case, which was filed one year after Brown v. Board of Education, 347 U.S. 483 (1954), is finally reaching its end. Filed in 1955 against the Nashville, Tennessee Board of Education, in 1963 it was consolidated with a parallel class action suit initiated against the Davidson County Board of Education in 1960. Although plaintiffs continued to press for relief, no significant school desegregation had occurred by the end of the decade. On July 16, 1970,

the District Court enjoined defendants from any construction and ordered the Board to develop a comprehensive desegregation plan. Kelley v. Metropolitan Board of Education, 317 F. Supp. 180 (M.D. Tenn. 1970).

The Board submitted its plan on August 25, 1970, but the District Court effectively stayed its order until the Supreme Court's resolution of pending school desegregation cases. The Court of Appeals for the Sixth Circuit vacated the stay and reinstated the District Court's order and noted that ". . . the instant case is growing hoary with age." Kelley v. Metropolitan Bd. of Ed., 436 F.2d 856, 858 (6th Cir. 1970). Upon remand the district court heard various desegregation plans, and selected an HEW plan. The Sixth Circuit affirmed. Kelley v.

Bd. of Ed., 463 F.2d 732 (6th Cir. 1972), cert. denied, 409 U.S. 1001 (1972), noting that "[t]he order of the District Judge is the first comprehensive and potentially effective desegregation order ever entered in this litigation." 463 F.2d at 734 (emphasis added).

During the ensuring years the plaintiffs continued to press for complete and effective relief, moved for the addition of new parties-defendant, objected to proposed attendance zone changes and school utilization plans and sought a more equitable distribution of desegregation burdens.[1] Between 1973 and 1979 the District Court did not take any action in this case, although the School Board filed various petitions relating to

[1] For a detailed account of events between 1971 and 1975, see 492 F. Supp. 172-75.

construction and the utilization of facilities. The plaintiffs responded to these petitions and filed motions for contempt in 1976 and 1979. In the latter motion plaintiffs alleged that the Board did not implement the 1971 plan in good faith and that the Board had contrived to perpetuate segregation.

The District Court held hearings in August of 1979. After finding that the Board had violated the spirit of the 1971 order, the District Court ordered it to devise a new comprehensive desegregation plan. After further hearings in the spring of 1980, the District Court held that the 1971 plan had been ineffective and gave specific direction to the Board on the necessary elements of a new plan. Kelley v. Metropolitan Bd. of Ed., 492 F. Supp. 167 (M.D. Tenn. 1980).

The Board filed its plan on January 19, 1981, and plaintiffs filed objections on March 25, 1981. After a further hearing on March 30, 1981, the District Court rejected plaintiffs' plan and ordered implementation of the Board's plan. The court also lifted its 1971 restriction on new construction. Kelley v. Metropolitan Bd. of Ed., 571 F. Supp. 1363 (M.D. Tenn. 1981). The Sixth Circuit's opinion and order, which affirmed in part and reversed in part, remanded for, inter alia, the development and implementation of a more comprehensive student assignment plan and for resolution of plaintiffs' unresolved requests for attorneys' fees dating back to the inception of the lawsuit. Kelley v.

Metropolitan Bd. of Ed., 687 F.2d 814 (6th Cir. 1982), cert. denied, 459 U.S. 1183 (1983).

On remand, the parties agreed to a final desegregation plan which, hopefully, will result in a desegregated and unitary system. The issue in the case as it reaches this Court relates solely to the appropriate amount to be awarded as attorneys fees to plaintiffs' counsel for their unremitting efforts over three decades to finally bring the Nashville school system into compliance with the law of the land as declared by this Court in 1954.

The initial attorneys' fee application was filed in early 1974. However, no action was taken on it by the district court until 1982. Pet. p. A-2. Through a variety of procedural rulings the district

court limited the award to $139,000, far less than the school board paid to counsel to defend it in its attempts to evade its obligations under the law.[2] The court of appeals held, rightly, that the amount awarded was inadequate and has remanded the case to the district court for further proceedings to determine the appropriate award.

None of the questions decided by the court of appeals are of such general applicability that they require review by this court. Rather, they arise from the specific factual context of the present case, relate to internal operating

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[2] As the court of appeals noted, in one five-year period alone, the defense attorneys received $288,000 in fees. Pet. p. A-16, n. 8.

procedures of the court of appeals, and to that court's interpretation of the meaning of its prior orders.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Sixth Circuit's Ruling Regarding The Relationship Between Costs And Attorneys' Fees Does Not Conflict With The Rulings of Any Other Court of Appeals Or of This Court.

The first issue presented by the petition in fact relates primarily to the procedures to be followed by a court of appeals in awarding attorneys' fees relating to a successful appeal in a civil rights case. The decision of the court below has put it in conformity with the practice of every other court of appeals, save two,[3] and is fully consis-

[3] Only the Eighth and Ninth Circuits have

tent with the civil rights attorneys' fees statutes and Rule 39(a), F. R. App. Proc.

The practice of the courts of appeals and of this Court is to award costs mandated by rule or statute automatically under certain circumstances. Thus, for example, if an appellant prevails he will ordinarily be reimbursed for printing the appendix, for filing fees, and, in the circuit courts, for printing the briefs.[4] On occasion, where, for example, there have been cross-appeals and the court has affirmed the judgment of the lower court in toto the appellate court will simply

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adopted the practice of the appellate court determining fee awards for appeals in civil rights cases. Rule 17, Rules of the United States Court of Appeals for the Eighth Circuit, Rule 14(g) of the Rules of the United States Court of Appeals for the Ninth Circuit.

[4] Rule 50, Rules of the Supreme Court of the United States; Rule 39, F.R. App. Proc.

provide that both parties will bear their own costs.[5] With the exceptions of the Courts of Appeals for the Eighth and Ninth Circuits , on the other hand,[6] the practice of the courts of appeals has been to leave the award of attorneys' fees with regard to appeals to the district court when, at the end of either the entire case or some discreet part thereof, it deals with the issue of entitlement to fees. The advantage of this practice as a practical matter, of course, is that where an attorneys' fee application is disputed issues relating to the appropriate amount may be resolved in a forum appropriate for the taking of evidence.

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[5] See, Rule 39, F.R. App. Proc., giving discretion to the court in assesssment of costs where a judgment is affirmed or reversed in part.

[6] See, n. 3, supra.

In Buian v. Baughard, 687 F.2d 859 (6th Cir. 1982), the Sixth Circuit departed from this procedure and announced that a prevailing plaintiff would not receive fees for appellate work unless he had already been awarded costs for the appeal. Thus, it equated the standards for awarding costs under Rule 39 and awarding fees under 42 U.S.C. § 1988.

Despite the announcement of this rule by one panel of the Sixth Circuit, various other panels did not follow it in practice, and there were a series of orders sending back to the district court the question of the disposition of fee requests for work done on appeal.[7] In the

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[7] See e.g., Greer v. Holt, No. 80-1548, Order of November 9, 1983; Buchanan v. City of Jackson, No. 81-5333, Order of April 23, 1984; Rowe v. Cleveland Pneumatic Company, No. 80-1407; King v. Roberts, No.82-5427, Order of Oct. 7, 1983; League of Women Voters of Tennessee v. Collins, No.81-5625, Order of Dec. 22, 1983. See

present case the original panel avoided the Buian rule by holding that it only applied to appeals decided after its announcement. Therefore, it was inappropriate for the district court to deny fees to the plaintiffs for successful appeals disposed of before Buian was decided.

Faced with the confusion which Buian had generated between panels of the court, the Sixth Circuit appropriately decided to deal with the question en banc in the present case. It held that because of the different standards for awarding attorneys' fees in civil rights cases and in awarding costs under Rule 39, the appropriate procedure to follow would be to have a district court award fees to prevailing plaintiffs for appeals in which

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also, Green v. Francis, No.81-5870, Order of June 20, 1983.

they were successful irrespective of whether costs were awarded under the rules of appellate procedure. (Pet., pp. A-6 to A-9.)

This is precisely the practice followed by virtually all other courts of appeals and, indeed, is the practice followed by this Court. Clearly, prevailing plaintiffs are entitled to fees for the time spent on successful appeals,[8] and just as clearly courts of appeals and this Court are ill-equipped to determine the amount of such fees. Since the standards for fees are different than the standards for awards of costs, the automatic and mechanical linking of the

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[8] See, e.g., Mims v. Wilson, 514 F.2d 106 (5th Cir. 1975); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

two, as was done in Buian, was in error and the court of appeals below has adopted the appropriate practice.

The petitioner's attempts to argue that there is no difference between fees and costs is simply a semantic game. For example, a successful defendant-appellee would be entitled to costs incurred in the court of appeals for printing its brief as matter of course.[9] It would not, however, be entitled to attorneys' fees as a matter of course since a defendant may only receive fees under the strict standards of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Conversely, a plaintiff-appellant may receive its appellate costs as a matter of course if successful on appeal from a dismissal of the action but would not be entitled to fees for that

[9] Rule 39(a), F.R. App. Proc.

appeal unless and until it was successful in some degree on the merits. Hanrahan v. Hampton, 446 U.S. 754 (1980).

Thus, the sum and substance of the decision of the court below to reject its own rule in Buian, is one of the procedures to be followed by the Sixth Circuit. None of the cases cited from other circuits by petitioner took the position of the Buian panel and, therefore, there is no conflict. Nor is the decision in conflict with Marek v. Chesny, ____ U.S. _____, 87 L.Ed.2d 1 (1985) which dealt with an entirely different question relating to the relationship of attorneys' fees and costs under Rule 68.

Finally, the petitioner's suggestion that the decision below is in conflict with the Eleventh Amendment, is totally without foundation. First, this action

involves local government bodies, Davidson County and the county school board. This Court has long held that the Eleventh Amendment does not apply to local governmental units.[10] Second, this Court held squarely in Hutto v. Finney, 437 U.S. 678 (1978), that there was no Eleventh Amendment bar to the award of attorneys' fees even against states.

II.

There Is No Conflict Between The Circuits With Regard to The Availability of Fees for Work Done Prior to 1972

Petitioners, by their second question presented, similarly seek to construct a significant issue involving a conflict between circuits where there simply is

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[10] See, Mount Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977) and cases there cited.

none. At issue in this case was whether the Sixth Circuit's disposition of earlier appeals constituted such a break in the litigation that fees should not be awarded for work done prior to the effective dates of the subsequently enacted attorneys' fees statutes.[11]

First this question lacks importance because it is unlikely to be recurring. Counsel for respondents have been involved in virtually all of the school desegregation litigation that arose prior to the effective date of the 1972 and 1976 fees acts. To our knowledge, there are at best two or three cases, that may involve issues even remotely similar to the one

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[11] 20 U.S.C. § 1617 (1972) and 42 U.S.C. § 1988 (1976).

presented here. See, e.g.,Gaines v. Dougherty County Bd. of Education, 775 F.2d 1565 (11th Cir. 1985).

Rather, the question of entitlement to fees for work done prior to the enactment of these statutes was largely disposed of by this Court's decisions in Bradley v. School Board of Richmond, 416 U.S. 696 (1974) and Hutto v. Finney, supra. In a few cases, the question arose whether there had been a break in the litigation either through the entry of a final desegregation order or through the final disposition of a fee application prior to the effective dates of the fee statutes. With the exception of the present case and Gaines those cases were decided years ago.[12]

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[12] The cases cited in the Petition for Writ of Certiorari at pp. 16-20 are essentially all of the cases in which the issue arose.

In each instance, whether fees could be recovered for pre-1972 work depended on the peculiar facts of each case and of courts of appeals' interpretations of their own disposition of earlier appeals. In Gaines, for example, whether or not plaintiffs' attorneys were entitled to fees for pre-1972 work was dependent on the meaning of prior orders of the appellate court that vacated or reversed district court orders relating to desegregation plans out that did not implicitly dispose of appeals of denials of attorneys' fees. The Eleventh Circuit reviewed the record and dispositively interpreted the meaning of its prior orders.[13]

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[13] The earlier decisions were rendered by the Fifth Circuit before its split into the Fifth and Eleventh Circuits.

Here, similarly, the issue of entitlement to fees for pre-1972 work depended on the interpretation of the meaning and effect of earlier orders within the peculiar facts of this case. The court of appeals, interpreting its own earlier decisions as well as those of the district court, concluded that there had been no break in the litigation, either actual or by contemplation of the parties. Therefore, there was no bar to the award of fees to which the plaintiffs would otherwise be clearly entitled under the decisions of this court in Bradley and Hutto. In light of the facts that (1) the disposition of this question depends on the specific facts of the case and the court of appeals' interpretation of its

own orders and (2) the unlikelihood of the issue recurring, there is no warrant for review by this court on certiorari.

Further, the alleged conflict between circuits simply does not exist. In all instances the courts of appeals, in deciding whether the fees to which plaintiffs were presumptively entitled under Bradley should be denied, have applied the same legal standards and have determined the question according to the peculiar facts of the case before it. Thus, there is no necessity for review of the question by this Court.

III.

The Question of the Calculation of the Amount of Fees Does Not Warrant Review By This Court.

With regard to the final question, there is similarly no basis for invocation of this Court's discretionary review. The court of appeals determined that the district court had determined an hourly rate based on improper legal standards. It remanded the case to the district court for determination of the rate on an appropriate basis. Given the peculiar factual issues raised in a disputed fee proceeding, the question does not present any overriding issues that have not already been sufficiently addressed by this court in its recent decisions in Hensley v. Eckerhart, 461 U.S. 424 (1983),

and Blum v. Stenson, ___ U.S. ___, 79 L.Ed. 891 (1984), which were cited and followed by the court below.

Thus, for example, the court of appeals applied the Blum rule that attorneys are to be awarded hourly rates that are within the parameters of customary fees in the community. The district court was directed to redetermine a proper hourly rate, which had to be at least the minimum that the record established was appropriate.

CONCLUSION

For the foregoing reasons, the issues in this case do not require review by this Court. The petition for writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
JAN 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,
Petitioners,

vs.

ROBERT W. KELLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari To The
United States Court of Appeals For the Sixth Circuit

REPLY BRIEF

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Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

REPLY BRIEF

The issues presented by the Petition for Certiorari concern the proper application of the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, to a thirty year old school desegregation case in which several desegregation plans, comporting with the ever-developing case law and factual circumstances, have been implemented in Nashville, Tennessee. The Sixth Circuit improperly applied this attorneys' fees statute which awards fees as costs, holding that attorneys fees could be awarded in 1982 for long-closed aspects of the case, including appeals for which the Court of Appeals had repeatedly refused to award costs, and actions taken long before a comprehensive and final desegregation plan was entered and implemented in 1971. In straining to reject the amount of fees awarded to the

plaintiffs by the District Court, the Sixth Circuit not only reversed or ignored its own precedent, it also applied principles inconsistent with this Court's decisions in *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), the Eleventh Amendment, and various circuit court opinions dealing with costs and finality, and it usurped the District Court's special function in attorneys' fees litigation. This decision forecasts an exponential increase in protracted attorneys' fees litigation.

Although full argument on the merits of the questions raised in the Petition for Certiorari is properly reserved for briefing on the merits, we take this opportunity to reply to several points raised in the respondents' Brief in Opposition.

I.

A Plain Meaning Interpretation Of The Cost Language In 42 U.S.C. §1988 Is Not A Meaningless Word Game. Rather, It Is An Interpretation Which Is Consistent With Congressional Intent, With This Court's Holding In *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), And Other Circuit Court Holdings, With The Eleventh Amendment, And With Efforts To Shorten Attorneys' Fees Litigation

When Congress enacted 42 U.S.C. §1988, permitting the award of attorneys' fees to prevailing plaintiffs "as part of the costs," it specifically states that attorneys' fees are to be treated "like other items of costs." S.R. 94-1011 at 5913.[1] At the time this statute was enacted, Rule 39(a), Federal Rules of Appellate Procedure, provided for the recovery of costs for prevailing parties, 'in keeping with the principle...that all items expended in the prosecution of a proceeding should be borne by the unsuccessful party."[2] Without even referring to the expressed Con-

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[1] *See* Petition for Certiorari, n. 15 at p. 15.

[2] Advisory Committee Notes to Rule 39, Federal Rules of Appellate Procedure.

gressional intent or to the extended discussion and adoption of the plain meaning interpretation of "costs" in 42 U.S.C. §1988 in *Marek v. Chesney,* ____ U.S. ____, 87 L.Ed.2d 1 (1985), the plaintiffs characterize the clear linkage between costs in Rule 39 and attorneys' fees awarded as costs in 42 U.S.C. §1988 as merely a "semantic game." (Brief in Opposition, p. 15.)

The plaintiffs consider *Marek v. Chesney* and the other circuit court cases cited in the Petition for Certiorari to be consistent with the Sixth Circuit's failure to link costs and fees in this case. Certainly *Marek* dealt with the relationship between a different procedural rule (Rule 68) which provides for an award of costs to a party if the ultimate judgment is not more favorable than its offer of judgment made before trial. Yet, nowhere did this Court in *Marek* indicate that it was playing a game when it painstakingly traced and linked the cost language in the procedural rule and the attorneys' fees statute.

Similarly, in the other cases which the plaintiffs dismiss as inexplicably consistent with the Sixth Circuit's opinion, several courts of appeal have equated costs under various procedural rules with costs under the Attorneys Fees Awards Act of 1976. In *Gary v. Spires,* 634 F.2d 722 (4th Cir. 1980), the Fourth Circuit reversed the trial court's award of fees pursuant to 42 U.S.C. §1988, because the cost provisions of Rule 54(d), Federal Rules of Civil Procedure had not been met. Rule 54(d) is, of course, the trial court counterpart to appellate rule 39. In *Bond v. Stanton,* 630 F.2d 1231 (7th Cir. 1980) and *Knighton v. Watkins,* 616 F.2d 795, 798 (5th Cir. 1980), the Seventh and Fifth Circuits also held that an application for fees under 42 U.S.C. §1988 is an application for costs at the trial level, and is governed by Rule 54(d), Federal Rules of Civil Procedure. Indeed, the Sixth Circuit's own decision in *Fulps v. City of Springfield,* 715 F.2d 1088 (6th Cir. 1983), was the first to link costs in offers of judgment under Rule 68 to costs in 42 U.S.C. §1988, and was relied upon by this Court in *Marek*. Surely these courts have not all been engaged in a useless word game.

In similar fashion, the plaintiffs seek to dismiss the inherent Eleventh Amendment problem created by the Sixth Circuit in *Kelley*, arguing that the Metropolitan Board of Education is not a state, and that, in any event, this Court eliminated any possible Eleventh Amendment problem with attorneys' fees in *Hutto v. Finney*, 437 U.S. 678 (1978). In making the bare assertion that the Board of Education is not a state or a state agency, the plaintiffs ignore that public education in the state of Tennessee is now and has always been a state function.[3] More importantly, most attorneys' fees cases involve states, state agencies, or state officials. Thus, if 42 U.S.C. §1988 is to be interpreted uniformly, regardless of the nature of the defendants, the cost language must be given its plain meaning. As Judge Kennedy wrote in dissent (A. 18-19), unless fees are awarded as costs there is no clear indication that Congress intended to abrogate the Eleventh Amendment by permitting an award of attorneys' fees against states. *E.g. Atascadero State Hospital v. Scanlon*, 473 U.S. ____, 105 S.Ct. 3142, 3148 (1985), *Hutto v. Finney*, 437 U.S. 678, 695-98 (1978).

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[3] The plaintiffs rely upon *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977) for the proposition that the Metropolitan Board of Education is not a state agency. (Brief in Opposition, p. 17.) However, this Court noted in *Mt. Healty* that the question is one of state law, and Tennessee law provides otherwise.

In *Leeper v. State*, 103 Tenn. 500, 534-535 (1899), the Supreme Court of the State of Tennessee long ago declared:

> "[T]he schools, in which are educated and trained children who are to become rulers of the commonwealth, are matters of state, and not local jurisdiction; that in such matters the state is a unit, and the legislature a source of power; that the establishment and control of public schools is a function of the general assembly, both under the Constitution and because it is a matter of state concern...."

See also Tennessee Constitution, Article XI, §12, and Title 49 of the Tennessee Code.

Finally, the plaintiffs seek to distinguish costs under Rule 39 and costs awarded as fees pursuant to 42 U.S.C. §1988 because the District Court is somehow better equipped to handle the issues. While the plaintiffs concede that at least two circuits have specifically provided for factual determinations to be made at the appellate level, the locus of the factual determination concerning rates or specific hours to be compensated is not the point of the requirement that costs be awarded to a prevailing plaintiff before he is entitled to fees. (Kennedy, A. 18, n. 1.) The award of costs by an appellate court constitutes a finding that the party receiving those costs has prevailed on the appeal.[4] Conversely, an appellate court's refusal to award costs to a party constitutes a finding that the party has not prevailed. This should make the trial court's job simpler, even if reference to the District Court is necessary to determine such issues as hourly rates. As Judge Kennedy wrote in dissent: "In the rare situation where the appellate court disallows costs entirely, the court very likely has a good reason for doing so, a reason which may or may not be apparent to the District Court when it decides a subsequent motion for attorneys' fees." (A. 18).

Thus, the plain meaning of the term "cost" serves an overriding and important purpose. It places the initial determination of who may be entitled to fees as successful plaintiffs under the applicable statute in the hands of those judges who read the briefs, heard the arguments, and decided the case, at or near the time the appellate decision was rendered. Such a construction can only help to eliminate protracted attorneys' fees litigation.

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[4] This of course does not mean, as plaintiffs suggest, that every party who prevails on appeal is entitled to costs including attorneys' fees. The cost award is merely a prerequisite for those who are otherwise eligible to receive fees under 42 U.S.C. §1988.

II.

The Majority's Holding That The 1971 Desegregation Order Was Not A Final And Discrete Step In The Litigation Foreclosing A Subsequent Award Of Attorneys' Fees Under The 1976 Civil Rights Attorneys Fees Awards Act Is Inconsistent With Its Own Characterization Of That Order In 1981, As Well As With The Standards For Finality Utilized In Other Circuits In Similar Situations.

In 1981, the Sixth Circuit Court of Appeals in this very case refused to permit the Board of Education to implement a new desegregation remedy mandated by the District Court that year because it found that the old 1971 plan was a *final one* which should not be modified until the Sixth Circuit had an opportunity to closely examine the proposed modifications. *Kelley v. Metropolitan County Board of Education,* No. 81-5370 (6th Cir. August 19, 1981) (S.A. 156).[5] In conformity with this characterization of the 1971 plan, the District Court in 1983 held that the 1971 plan was a discrete and final step in the desegregation litigation, and that the plaintiffs could not reopen that final order by a motion for fees made several years later. (A. 50-53.) Now the Court of Appeals has *recharacterized* the 1971 plan in its *en banc* opinion, holding that the 1971 order was not a final order in the eyes of the parties.

The plaintiffs never address these inconsistencies in their Brief in Opposition. Instead they argue that no inconsistencies exist between the Sixth Circuit's criteria for finality in attorneys' fees litigation and that applied in other circuits. Yet the inconsistencies in the Sixth Circuit's own opinions in 1981 and 1985 (S.A. 156, A. 3-6, 32) point toward different standards for finality—one objective (the 1981 substantive decision) looking toward the nature of the order in question and the other subjective (the 1985 attorneys' fees decision) looking toward the parties' subjective expectations.

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[5] *See,* Petition for Certiorari, p. 23.

In contrast, the criteria used in *Henry v. Clarksdale Municipal Special School District*, 579 F.2d 916 (5th Cir. 1978), and *Wheeler v. Durham City Board of Education*, 585 F.2d 618 (4th Cir. 1978), were objective in nature. That is, the courts looked to the nature of the remedial order as did the District Court in this case (A. 51-52), not the intent of the parties, and found that proceedings after the pivotal orders would necessarily be supplemental in nature. In Nashville, as in these cases, liability and remedy were fixed in 1971, and if changed circumstances had not occurred in the intervening decade, the 1971 remedy would be in place here today.[6] This is what the Sixth Circuit recognized in 1981 when it termed the 1971 remedy a final one, applying the same objective standard utilized in other cases. Thus, the Sixth Circuit standard is not consistent with that used in other circuits, and indeed, it is inconsistent with its own standards previously applied to the substantive aspects of this case.

The plaintiffs argue further that any such inconsistency, if it exists, is of no import, because they know of no other recent cases where this issue has arisen.[7] The defendants respectfully submit that this is an issue which may well arise at any time in many other desegregation cases across the country where jurisdiction has been retained to monitor progress under a comprehensive desegregation plan. Should changes in circumstances, contemptuous activities, or adverse effects mandate a change in a desegregation remedy, this issue will quite likely resurface. Moreover, this issue *will* certainly arise again in this very case if hearings are held in the District Court on

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[6] The defendants strongly object to plaintiffs' repeated efforts to suggest that the motivation for the District Court's modification of the desegregation plan in 1981 was school board misconduct. (Brief in Opposition, p. 5.) The District Court has repeatedly stated that it was the 1971 plan itself, despite the good faith efforts of the board towards implementation of that plan, which caused population shifts resulting in resegregation. (A. 66-67.)

pre-1971 fees. Prior to 1971 there were several final remedial orders entered by the District Court and Sixth Circuit, and such orders required the implementation of new desegregation plans comporting with the law and facts as they existed at that time. (Petition for Certiorari, n. 1 at p. 1.) The hazy and subjective line drawn by the Sixth Circuit will undoubtedly produce further litigation in this very case.

III.

The Sixth Circuit's Usurpation Of The District Court's Discretion In Awarding Attorneys' Fees Pursuant To 42 U.S.C. §1988 Warrants The Exercise Of This Court's Supervisory Jurisdiction

In their Brief in Opposition, plaintiffs argue that there is no overriding reason to review the Court of Appeals' usurpation of the District Court's discretion in awarding fees because the relevant standards have previously been addressed by this Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), and *Blum v. Stenson,* ____ U.S. ____, 79 L.Ed.2d 891 (1984). In this argument the plaintiffs address only the calculation of the hourly fee by the District Court, but in so doing, the plaintiffs underscore the inherently flawed approach toward fee awards taken by the Sixth Circuit and the importance of this Court's consideration thereof.

The plaintiffs admit that *Blum v. Stenson,* ____ U.S. ____, 79 L.Ed.2d 891 (1984), mandates fee awards which fall "within the parameters of customary community rates." (Brief in Opposition, p. 24.) As outlined in the defendants' Petition and in the dissenting opinions (A. 23, 25-28), the hourly rates applied by

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[7] The plaintiffs have cited *Gaines v. Dougherty County Board of Education,* 775 F.2d 1565 (11th Cir. 1985) in support of their argument that the Sixth Circuit ruled properly concerning the finality of the 1971 order. In *Gaines,* however, no final order was implemented pursuant to *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) until 1980-81. 775 F.2d at 1567.

the District Court ($100.00 for experienced counsel and $60.00 for associate counsel) were well within these parameters. Yet the Court of Appeals *required* the District Court to award plaintiffs' senior counsel his own personal billing rate, a rate which was higher than the prevailing community rate.

In rejecting the District Court's fact-finding concerning both rates and the finality of the 1971 order,[8] the Court of Appeals substituted its own fact-finding for that of the District Court without ever stating that the District Court strayed from the proof presented to it. Such a usurpation of the District Court's role, particularly in attorneys' fees litigation where the reasonableness of a fee award is to be examined under an abuse of discretion standard,[9] forecasts an unending litany of appeals from attorneys' fees awards in the Sixth Circuit, and so departs from the accepted practice in attorneys' fees litigation that review pursuant to this Court's supervisory jurisdiction under Rule 17(a), Rules of the Supreme Court, is appropriate.

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[8] For a full discussion of the finality issue, see Section II, *supra,* and Petition for Certiorari, pp. 23-24.

[9] *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717 (5th Cir. 1974).